

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<i>In re</i>	:	Chapter 11
BIORA THERAPEUTICS, INC., ¹	:	Case No. 24-12849 (BLS)
	:	
Debtor.	:	Re: D.I. 56, 73, 117 and 120
	:	

**UNITED STATES TRUSTEE’S OBJECTION TO THE DEBTOR’S MOTION
TO SELL SUBSTANTIALLY ALL OF ITS ASSETS**

Andrew R. Vara, the United States Trustee for Regions 3 and 9 (the “U.S. Trustee”), files this objection to the approval of the proposed sale of substantially all of the Debtor’s assets to BT BIDCO LLC (the “Stalking Horse”), a new entity formed by or on behalf of certain noteholders under the issuer’s Prepetition A&R Indenture² (the “DIP Lenders”), and in support thereof, states:

I. INTRODUCTION

1. The DIP Lenders and the Official Committee of Unsecured Creditors (the “Committee”) are attempting to write a new playbook that outlines how to obtain approval of priority-skipping, end-of-case distributions without the consent of skipped, higher priority creditors, despite the Supreme Court’s ruling that such distributions are impermissible in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017). The alchemy to turn impermissible end-

¹ The last four digits of Biora Therapeutics, Inc.’s federal tax identification number are 0390. Biora Therapeutics, Inc.’s service address is 10070 Carroll Canyon Road, Suite 100, San Diego, CA 92131.

² As defined in the *Debtor’s Motion for Entry of Interim and Final Orders (I) Authorizing Debtor to (A) Obtain Postpetition Senior Secured Financing and (B) Use Cash Collateral, (II) Granting Adequate Protection to Prepetition Senior Secured Parties, (III) Granting Liens and Superpriority Claims, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* [D.I. 18; the “DIP Financing Motion”].

of-case, priority-skipping distributions of estate property into “permissible” distributions of “non-estate” property that are not “end of case” distributions in violation of the Bankruptcy Code’s priorities, occurs through a multi-step process:

- a. The Committee and the DIP Lender agree to a settlement that (a) resolves the Committee’s objections to the DIP financing motion, which includes the Committee’s support for 506(c) and 552 waivers, for shortening the Challenge Period and for the releases granted to the DIP Lenders and Agent, (b) results in no Challenges being pursued, and (c) resolves the Committee’s objections to a sale of substantially all of the Debtor’s assets through a credit bid, including the sale of *all* estate causes of action.
- b. The settlement provides the transfer of assets to a trust that will solely benefit unsecured creditors, and apparently only benefits *certain* unsecured creditors.
- c. The assets transferred to this trust are: (a) the estate’s fraudulent transfer actions (and, presumably, avoidance actions created by the Bankruptcy Code, provided that such actions are not against go-forward trade vendors); (b) the estate’s commercial tort claims; (c) cash equal to 100% of the savings from the DIP budget, calculated as of the closing date of the sale with respect to the Committee’s professional fees; (d) cash equal to 75% of the savings from the DIP budget, calculated as of the closing date of the sale with respect to the Debtor’s professional fees; and (e) a cash payment of \$400,000. In addition, the DIP Lender agrees that the Assumed Liabilities (part of the Purchase Price) under the Stalking Horse APA will be no less than \$500,000 (without disclosing (i) what liabilities are being assumed and (ii) what (if any) business purpose supports assuming such liabilities).
- d. The parties do not seek approval of the settlement (a) at the time that it is entered, (b) prior to the Committee’s support of the final DIP order and its entry, (c) prior to the Committee’s support of the sale order and its entry, or (d) prior to the closing of the sale.
- e. The settlement only provides that the parties will “discuss a mutually acceptable exit strategy.”
- f. The sale closes, the Debtor sells all the estate’s assets, other than (i) funds budgeted for the wind-down and (ii) other negligible assets.
- g. The transfer of the causes of action to the trust occurs “upon the closing” of the sale, such that the estate’s causes of action will pass from the Debtor’s estate to the purchaser and then to the trust *instantaneously*.

2. While creative, this scheme simply calls a rose by another name hoping to convince the Court that it is no longer a rose. The Court should not accept the sleight of hand and should recognize what is happening – the Committee is attempting to leverage its rights and estate assets to facilitate class-skipping distributions³ outside of a chapter 11 plan. The Committee has no power to facilitate these impermissible distributions.

II. FACTUAL BACKGROUND

3. On December 27, 2024 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code.

4. On January 16, 2025, the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the “Committee”).

5. The Debtor sought interim approval to obtain debtor-in-possession (“DIP”) financing from the DIP Lenders on the Petition Date. Through the DIP Financing Motion, the Debtor sought to obtain “new money loans” of up to \$10.25 million and a “roll-up loan” of \$35.875 million. Only prepetition secured debt owed to the DIP Lenders was included in the rolled-up DIP loan. DIP Financing Mot. ¶¶ 15, 26 & 31.

6. The proposed DIP loan would be secured by (i) first priority liens on all unencumbered assets of the Debtor, (ii) first priority liens on all collateral that serve as collateral under the Prepetition A&R Indenture, and (iii) junior liens on all other encumbered assets of the Debtor. DIP Financing Mot. ¶ 31. The liens securing the DIP loan would include liens on the proceeds of Avoidance Actions (upon entry of a final order). *Id.*

³ The Debtor’s schedules list 33 governmental authorities who may be entitled to priority claims based on taxes, licenses and fees. No bar date has been established in these cases but a handful of priority claims have already been filed. In addition, the settlement appears to skip unsecured creditors who do not hold trade, landlord or noteholder claims. The Debtor schedules list over \$2.1 million in undisputed claims owed to the Department of Justices in California and New York, as well as unliquidated and disputed claims asserted by the Securities and Exchange Commission. Further, there are various customer claims for “lab refunds.” All of these creditors appear to be “skipped” through this settlement.

7. Through the proposed orders approving the DIP Financing Motion, the Debtor provided stipulations regarding the validity, extent and priority of the Prepetition A&R Indenture. DIP Financing Mot. Ex. A (Interim Order) ¶ 4(a). The Debtor also released the DIP Lenders, the DIP agent, other prepetition secured parties, and related parties to each of them, of all claims relating to the DIP Obligations, the DIP Superpriority Claims, the DIP Liens, the Prepetition Liens and the Prepetition Obligations, including any “lender liability” claims, all claims under the Bankruptcy Code, and all claims regarding the validity, priority, extent, enforceability, perfection or avoidability of liens and claims. DIP Financing Mot. Ex. A (Interim Order) ¶ 29.

8. The Debtor requested authority to waive all section 506(c) claims and “equities of the case” exceptions under Section 552(b) of the Bankruptcy Code, and also waive the equitable doctrine of “marshalling,” subject to the entry of final order. DIP Financing Mot. Ex. A (Interim Order) ¶ 14.

9. On December 30, 2024, the Court entered an interim order granting the DIP Financing Motion on an interim basis (the “Interim Financing Order”) [D.I. 39]. The Interim Financing Order included the various stipulations and releases requested by the Debtor, provided that the marshalling, 506(c) and 552(b) waivers would be binding if included in a final order approving same and further provided parties in interest with 75 days to assert a Challenge to any of the Debtor’s stipulations. *Id.* The order also provided that the Committee could agree to reduce the Challenge Period on behalf of all parties, unless a party objected to the Committee’s right to shorten the challenge period prior to the final hearing on the DIP Financing Motion. Interim Financing Order ¶ 28(a).

10. On January 6, 2025, the Debtor filed a motion to establish bidding and auction procedures relating to a sale of substantially all its assets and to designate the Stalking Horse as

the Stalking Horse Purchaser (“Sale Motion”) [D.I. 56].

11. On January 17, 2025, the Debtor filed the proposed Stalking Horse asset purchase agreement (“Stalking Horse APA”) [D.I. 73]. The agreement provides:

- a. The “Purchase Price” constitutes the Credit Bid of \$30 million, the “Assumed Liabilities” provided in Section 2.3, and the Excluded Cash. Stalking Horse APA ¶ 3.1.
- b. All of the Assumed Liabilities are all liabilities that will arise after the closing date, other than the following Assumed Liabilities that accrued, or could have accrued, prior to the closing date: (a) liabilities under each employee Assumed Benefit Plan; (b) PTO obligations owed to employees; (c) ordinary course administrative expenses arising after the Petition Date that are included in the DIP Budget, accrued and unpaid as of the Closing, and are not otherwise included in the Wind-Down Amount or the Wind-Down Budget; and (d) Cure Costs in an amount up to \$250,000. Assumed Liabilities also include “those Liabilities specifically set forth in Schedule 2.3(h),” but the schedule is not filed with the court. *Id.* ¶ 2.3.
- c. Excluded Cash means cash on hand and cash drawn under the DIP Facility equal to the Wind-Down Amount plus an amount sufficient to pay all ordinary course Administrative Expenses incurred on or after the Petition Date that are included in the DIP Budget, that are accrued but unpaid as of the Closing, and that are not Assumed Liabilities or otherwise included in the Wind-Down Amount or Wind-Down Budget. *Id.* ¶ 1.1.
- d. The Stalking Horse will purchase all “Acquired Assets,” defined as all assets of the Debtor other than Excluded Assets. Acquired Assets include all cash other than Excluded Cash, and all causes of action of the Debtor, including any causes of action under the Bankruptcy Code (and, necessarily, all causes of action that the estate may have against the DIP Lender). *Id.* ¶ 2.1.
- e. “Excluded Assets” are any Equity Securities of the Debtor, the Excluded Cash (except to the Extent of any DIP Reversionary Interest), bank accounts but solely to the extent that they hold Excluded Cash, Contracts that are not Assigned Contracts, certain books and records, retained Seller Benefit Plans, Debtor’s director and officer insurance policies, and, potentially, certain clinical records and biological samples. *Id.* ¶ 2.2.
- f. The “DIP Reversionary Interest” is any Excluded Cash remaining after all administrative expenses and expenses associated with the wind-down activities (up to a limit of \$600,000) have been paid. *Id.* ¶ 1.1.

12. The proposed sale order (“Proposed Sale Order”) [D.I. 74] provides that the

Debtor's stipulations are binding on all parties, and the right to assert a Challenge expired prior to entry of the sale order. Proposed Sale Order ¶ 5. It further confirms the right to credit bid and approves the Stalking Horse APA and all transactions contemplated thereunder. *Id.* ¶¶ 3 & 5.

13. The Debtor's schedules list 33 governmental agencies as potentially holding priority claims relating to taxes, licenses and fees. A bar date has not been established but a few priority claims have already been filed against the estate. In addition, there are over \$2.1 million in undisputed claims asserted by the Department of Justices in California and New York listed on the Debtor's schedules, as well as unliquidated and disputed claims asserted by the Securities and Exchange Commission and various undisputed claims held by several customers for "lab refunds." These creditors appear to be unable to participate in the settlement, as they do not appear to be trade, landlord or note claims.

14. The Committee and the DIP Lender disclosed a settlement agreement in connection with the final hearing on the DIP Financing Motion (the "Committee Settlement Term Sheet") [D.I. 143-1, Exh. 3].

15. Pursuant to the Committee Settlement Term Sheet, the Committee will support (i) the shortening of the Challenge Period (for all parties, and not just the Committee) to February 25, 2025; (ii) the Bid Procedures as approved pursuant to the Bidding Procedures Order; (iii) the releases of the DIP Lender and the Agent contained in the DIP financing order; and (iv) the section 506(c) and 552 waivers contained in the DIP Financing orders. Committee Settlement Term Sheet. At the final hearing on the DIP Financing Motion, the Committee did not object to the entry of the final order approving same.

16. A condition to the effectiveness of the settlement is that the Committee has not brought a Challenge as of February 25, 2025. *Id.*

17. In exchange for the Committee’s undertakings, the Stalking Horse, the Agent and the DIP Lender agree to contribute to a state law trust: (i) \$400,000; (ii) 100% of savings from the DIP budget calculated as of the closing date of the sale, with respect to the Committee’s professional fees; (iii) 75% of the savings from the DIP budget calculated as of the closing date of the sale, with respect to Debtor’s professional fees; and (iv) all of the commercial tort claims and fraudulent transfer claims (other than Avoidance Actions against go-forward trade vendors) that the Stalking Horse purchases from the Debtor. The causes of action will be transferred to the trust upon the closing of the sale. *Id.*

18. The beneficiaries of the trust “shall be the *trade* creditors, landlord, and holders of the 2025 Convertible Notes.”⁴ *Id.* (emphasis added).

19. The DIP Lender will also pay \$75,000 to The Bank of New York Mellon Trust Company, N.A., the indenture trustee for the 2025 Convertible Notes, on behalf of its professional fees and expenses. *Id.*

20. Under the Committee Settlement Term Sheet, the Stalking Horse agrees to amend the Stalking Horse APA to provide that (i) causes of action arising under the Bankruptcy Code and similar state-law avoidance actions purchased by the Stalking Horse will not be pursued against go-forward trade vendors, but can be utilized defensively, and (ii) the Assumed Liabilities (which constitute a portion of the Purchase Price) shall be no less than \$500,000. *Id.*

21. The trustee of the trust shall be selected by the Committee and shall be reasonably

⁴ The Debtor’s schedules list several claims as “Litigation” claims and not “Trade Claim[s].” These claimholders include the Securities and Exchange Commission, stockholders, and various individuals. The schedules also list several “settlement” claims, owed to the Department of Justices in California, New York and New Jersey. Several individuals are listed on the schedules as being owed “lab refunds.” There are also priority claims on the claims register asserted by governmental agencies based on tax claims. None of these claims appear to constitute claims held by trade creditors, the landlord, or the noteholders under the Committee Settlement Term Sheet, and may, therefore, not be beneficiaries of the trust.

acceptable to the DIP Lenders. *Id.* No further details about the trust beyond what is in the Committee Settlement Term Sheet are provided, including, without limitation, (a) who the beneficiaries are; (b) how the beneficiaries will assert claims against the trust; (c) how objections to such claims will be resolved; (d) who will pursue the causes of action; (e) how cash belonging to the trust will be invested; (f) whether a bond will be required by the trustee; (g) when distributions will be made, when they will be considered “unclaimed,” and if there will be a minimum amount for each distribution, among other standard provisions typically disclosed when a liquidation trust is proposed pursuant to a chapter 11 plan.

22. The Committee Term Sheet provides that the parties will “discuss a mutually acceptable exit strategy. *Id.*

23. The Committee Settlement Term Sheet was filed on the docket on February 18, 2025. The sale hearing is scheduled for February 25, 2025. It appears that administrative, secured and priority claimants have not been served with the Committee Settlement Term Sheet. Because it is unclear who is and who is not a beneficiary of the proposed trust under the Committee Settlement Term Sheet, a party in interest would not necessarily be aware of a need to file an objection even if the party was served with the Committee Settlement Term Sheet.

24. At the final hearing on the DIP Financing Motion, the Committee and the DIP Lender acknowledged that more work needs to be done to convert the Committee Settlement Term Sheet into a complete settlement. They further suggested that it is possible that the Committee Settlement Term Sheet does not require court approval, asserting that the Committee and the DIP Lenders are “third parties” and that the assets to be transferred to the trust are not “estate assets.”

II. ARGUMENT

25. First, section 1103(c) of the Bankruptcy Code cabins the Committee’s authority, and the Committee does not have the power to participate in distributive schemes outside of formulation of a chapter 11 plan.

26. Section 1103(c) states:

(c) A committee appointed under section 1102 of this title may—

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee’s determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.

11 U.S.C. § 1103(c).

27. The *ejusdem generis* rule of statutory interpretation “seeks to afford a statute the scope a reasonable reader would attribute to it.” *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204, 217 (2024). The Supreme Court recently applied the canon of *ejusdem generis* to section 1123(b) of the Bankruptcy Code, which is structured similarly to section 1103(c) – meaning, both subsections contain a “catchall phrase tacked on at the end of a long and detailed list of specific directions,” prefaced by the word “may.” *Harrington v. Purdue Pharma, L.P.*, 603 U.S.

204, 217; see *Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 562-63 (considering the rule of *ejusdem generis* in the context of section 1103(c); citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001)); *In re Dow Corning Corp.*, 199 B.R. 896, 901 (applying rule of *ejusdem generis* in construing section 1103(c)(5)).

28. While the Committee would have this Court believe that section 1103(c)(5) permits the Committee to be party to the proposed settlement, the Committee's contention cannot be squared with the *ejusdem generis* canon. The Committee's authorization to negotiate a distribution arrangement is limited by the plain text of section 1103(c) to exactly one instance: "participat[ing] in the formation of a [chapter 11] plan" 11 U.S.C. § 1103(c)(3). Leveraging Committee objections and estate claims/causes of action for a transfer of value to a newly-formed trust for distribution to certain unsecured creditors outside of a chapter 11 plan is a materially different activity than participating in the formulation of a chapter 11 plan, especially given that claimants senior to general unsecured creditors (secured, administrative, and priority) and certain general unsecured creditors are/may not be trust beneficiaries under the Committee Settlement Term Sheet. By extension, the Committee is powerless to agree to the distribution scheme contained in the Committee Settlement Term Sheet, as the Code section 1103(c)(5) "catchall" does not permit its participation.

29. Second, bankruptcy courts may not approve structured dismissals or other final distributions of property that violate the Code's priority rules without the affected creditors' consent. In *Jevic*, the United States Supreme Court reaffirmed the Code's bedrock priority rules by holding that they must be respected and applied when property is finally distributed, even

absent a confirmed plan.⁵ In doing so, the Court roundly rejected the Third Circuit’s relaxation of the priority rules in allegedly “rare” cases where the proposed “distributions would make some creditors (high- and low-priority creditors) better off without making other (midpriority) creditors worse off (for they would receive nothing regardless).” 580 U.S. at 469.

30. Moreover, the fiction of “gifting” by high-priority creditors to low-priority creditors to evade the Code’s priority rules does not (and cannot) square with the Supreme Court’s unequivocal support for “the protections Congress granted particular classes of creditors.” *See Id.* at 470. The Supreme Court recognized that skipping priority claimants undermines the rights of creditors by, among other harms, depriving them of the prospect of a settlement that respects their priority. *See id.* at 464. Similarly, “gifting” here (by utilizing estate rights and assets to fund potential class-skipping distributions to creditors) unleashes the very harms that the Court sought to avoid: namely, (i) changes in the bargaining power of different classes of creditors, (ii) collusion between senior secured creditors and unsecured creditors to squeeze out priority unsecured creditors, and (iii) the increased difficulty of reaching global settlements due to greater uncertainty of the results. For all these reasons, the Committee Settlement Term Sheet violates the Code’s priority rules and present this Court with the same question that the Supreme Court previously answered. This Court should apply *Jevic* and deny approval of the Committee Settlement Term Sheet, and thus, deny approval of the Sale Motion.

A. The Court Must Consider Whether the Committee Term Sheet Is Permissible Prior to Ruling on the Sale

31. The Debtor, the Committee and the DIP Lenders may take the position that,

⁵ The Court left unresolved whether structured dismissals that do not violate priority are permissible. *See Jevic*, 580 U.S. at 467. (“We express no view about the legality of structured dismissals in general.”). But it did acknowledge that final distributions of estate assets “normally take place through a Chapter 7 liquidation or a Chapter 11 plan” *Id.* at 464.

because no party is currently seeking approval of the Committee Settlement Term Sheet in connection with the approval of the sale, the Court should not review it at this time. This is incorrect for three reasons.

32. First, the Committee Settlement Term Sheet requires that the Stalking Horse APA be amended in at least two ways: (a) the Assumed Liabilities must be amended to require that the Stalking Horse will assume a minimum of \$500,000 of Assumed Liabilities; and (b) the Stalking Horse APA must be modified to include a covenant that the Stalking Horse shall not pursue Avoidance Actions against go-forward creditors. As critical aspects of the deal terms will be incorporated into the Stalking Horse APA, this Court should determine if the deal can be approved prior to approving a sale that incorporates such terms.

33. Second, the *quid pro quo* provided by the Committee is the agreement to support various aspects of the DIP Financing Order, including releases, the shortening of the Challenge Period, the passage of the Challenge Period without a Challenge and the resulting confirmation of the validity of the credit bid, and supporting the sale. If the sale order is entered, the consideration provided by the Committee will have been given to the DIP Lenders, but none of the DIP Lenders' consideration will have been provided to the Committee. If subsequently, the Committee Settlement Term Sheet is disallowed, an estate fiduciary would have provided valuable consideration to the DIP Lenders without the ability to receive any consideration in exchange.⁶

34. Third, creditors who may be harmed by the approval of the revised Stalking Horse

⁶ This aspect of the Committee Settlement Term Sheet demonstrates precisely why this is not a "gift," but rather an exchange for value. The value provided by the Committee is the release and agreement not to pursue estate claims/causes of action and objections. Permitting the DIP Lenders to obtain that value without a legally-enforceable obligation to provide consideration would likely constitute a breach of the Committee's fiduciary duties.

APA have not received meaningful notice. The Stalking Horse has agreed to increase the Purchase Price by increasing the amount of Assumed Liabilities it will assume. No transparency is provided as to what liabilities are being assumed, to whom the liabilities are owed, or what, if any, business purpose there is in assuming the liabilities. If, for example, the Stalking Horse APA is amended to provide that the Stalking Horse will provide a *pro rata* distribution of the \$500,000 to holders of certain types of unsecured claims, this would be a clear violation of *Jevic*: the Purchase Price for the sale of the Debtor's assets would be distributed to low-priority creditors without the consent of higher-priority creditors solely because the senior creditors and the junior creditors negotiated the rights of the middle creditors away. Likewise, secured, administrative, priority, and disfavored unsecured claimants/creditors should receive notice that the Committee has entered into a settlement and is supporting a sale process that does (or arguably does) distribute a portion of the Purchase Price solely to favored unsecured creditors. Such claimants/creditors should have ample opportunity to object to the Committee Settlement Term Sheet prior to the approval of the sale.⁷

B. *Jevic* Supports the Denial of the Settlement and Thus Denial of a Sale that Incorporates the Settlement's Terms.

i. *Jevic* Restores Priority Rights Fundamental to the Code's Operation.

35. In *Jevic*, the Supreme Court ruled that a "distribution scheme ordered in connection with the dismissal of a Chapter 11 case cannot, without the consent of the affected

⁷ As noted by the Second Circuit, "whether a pre-plan settlement's distribution plan complies with the Bankruptcy Code's priority scheme will be the most important factor for a bankruptcy court to consider in approving a settlement under Bankruptcy Rule 9019. In most cases, it will be dispositive." *In re Iridium Operating LLC*, 478 F.3d 452, 455 (2d Cir. 2007). The *Iridium* court concluded that a bankruptcy court could "endorse a settlement that does not comply *in some minor respects* with the priority rule if the parties to the settlement justify, and the reviewing court clearly articulates the reasons for approving, a settlement that deviates from the priority rule." *Id.* at 465. Because the Committee Settlement Term Sheet contemplates a settlement that would violate the Bankruptcy Code's distribution scheme, higher priority creditors must receive notice and be able to object thereto.

parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies.”⁸ 580 U.S. at 455. In doing so, the Court reversed an order approving a settlement of a fraudulent conveyance lawsuit that gave money to high-priority secured creditors and to low-priority general unsecured creditors, skipping certain dissenting mid-priority creditors. *Id.* The Supreme Court considered several justifications offered in support of the priority-skipping deal. It rejected all of them.

36. First, the settling parties disputed that the skipped creditors had standing to challenge the structured dismissal at all. They argued that the skipped creditors would have received nothing even if the bankruptcy court had never approved the structured dismissal and would still get nothing if the structured dismissal were unwound on appeal. The Supreme Court was not persuaded. It reasoned that the structured dismissal and related fraudulent conveyance settlement harmed the skipped creditors because they “lost a chance to obtain a settlement that respected their priority [or] the power to bring their own lawsuit on a claim that had a settlement value of \$3.7 million.” 580 U.S. at 464. In reaching this conclusion, the Supreme Court questioned and ultimately rejected assertions that settlement could only occur through a priority violation and that the fraudulent conveyance claims had no value. *Id.* at 463. Overturning the

⁸ *Jevic* is entirely consistent with the Court’s long history of protecting the procedural and substantive rights of creditors, not courts, to determine whether to accept a proposal that does not follow the priorities of distribution established by the Bankruptcy Code: “the Code provides that it is up to the creditors—and not the courts—to accept or reject a reorganization plan which fails to . . . honor the absolute priority rule.” *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988). Even if a “Court . . . believe[s] that petitioners or other unsecured creditors would be better off . . .” with the proposed deal, that “determination is for the creditors to make in the manner specified by the Code.” *Id.* And if this is true when a plan is proposed and creditors are afforded the procedural safeguards attendant to plan confirmation and voting, it must be “doubly” true when creditors are denied them. Not only did the Court in *Jevic* cite *Ahlers* with approval, *Jevic*, 580 U.S. at 471, it reiterated the importance of the Code’s procedural safeguards. *Id.* at 468 (explaining distributions looked like transactions disallowed by lower courts because they “circumvent the Code’s procedural safeguards”).

structured dismissal would redress the skipped creditors' loss because it would reinstate the fraudulent conveyance claims. Consequently, the skipped creditors had standing. *Id.* at 464.

37. Second, the settling parties argued (and the lower courts agreed) that the Code's priority rules only apply to chapter 11 plans (and chapter 7 liquidations). The Supreme Court disagreed. Because the priority rules have "long been considered fundamental to the Bankruptcy Code's operation," limiting their scope requires more than mere legislative silence. *Id.* at 465 (citations omitted). The Supreme Court saw no indication that Congress intended a "major" departure from the priority system through a structured dismissal. *Id.* ("we would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans.").⁹

38. Third, the parties claimed that, under the allegedly rare circumstances of the case, the Court faced a binary choice of approving a settlement that made many creditors better off or rejecting the settlement and leaving all creditors empty-handed—an argument that the bankruptcy court had adopted. *See In re Jevic*, 08-11006, Docket No. 1519, *14 (Bankr.D.Del. Dec. 4, 2012) ("I am presented with two options, a meaningful return or zero."). The Supreme Court, however, was unmoved and reiterated that courts cannot "alter the balance struck by the statute . . . not even in rare cases." 580 U.S. at 471 (*quoting Law v. Siegel*, 134 S. Ct. 1188, 1198 (2014)) (further citations omitted).

⁹ In arriving at the conclusion that the Code does not authorize general end-of-case distributions outside of a chapter 11 plan, the Court found that "the word 'cause' [in section 349(b)] is too weak a reed upon which to rest so weighty a power." 580 U.S. at 466 (*citing United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (noting that "[s]tatutory construction ... is a holistic endeavor" and that a court should select a "meanin[g that] produces a substantive effect that is compatible with the rest of the law")) (further citations omitted).

39. The Supreme Court also saw through the “rare case” purported justification for granting relief as being both dubious and dangerous. “[O]ne can readily imagine other cases that turn on comparably dubious predictions. . . . ‘[D]ebtors and favored creditors can be expected to make every case that ‘rare case.’”¹⁰ *Jevic*, 580 U.S. at 470 (citation omitted). The Court further found the “rare case” exception to be dangerous because it would inflict uncertainty upon the bankruptcy system with serious consequences—consequences including collusion and changes in bargaining power even in cases not ending in a structured dismissal. *Id.* (observing that the consequences of the rare case justification “include risks of collusion, *i.e.*, senior secured creditors and general unsecured creditors teaming up to squeeze out priority unsecured creditors.”).

ii. *Jevic* Casts Doubt on *ICL*’s Continued Viability.

40. Before the Supreme Court’s consideration of *Jevic*, the Third Circuit decided *In re ICL Holding Co., Inc.*, 802 F.3d 547 (3d Cir. 2015). In *ICL*, the Third Circuit affirmed an order approving a pre-plan settlement between an official creditors’ committee and a secured lender group that had purchased the debtors’ assets. Similar to *Jevic*, high-priority (secured) creditors and low-priority (unsecured) creditors teamed up to squeeze out a dissenting mid-priority creditor (the United States, which held a large tax claim entitled to administrative priority). But unlike *Jevic*, the settling parties in *ICL* argued that the settlement payments did not belong to the estate and were instead a “gift” of the secured lenders’ own money.

41. Under the specific facts of the case, the Third Circuit agreed that the payment scheme did not involve bankruptcy estate property and therefore did not implicate the Code’s

¹⁰ Here, there is no allegation of a “rare” case such as was present in *Jevic*. There is no allegation that the DIP Lender would not agree to provide the same consideration being transferred through the settlement to the estate generally, to be distributed in accordance with the Bankruptcy Code’s priority scheme.

priority rules. *Id.* at 556 (“the settlement sums paid by the [secured lenders and affiliated] purchaser were not proceeds from its liens, did not at any time belong to LifeCare’s estate, and will not become part of its estate even as a pass-through”). In essence, *ICL* limited the scope of the priority rules on the grounds that the Code did not expressly prohibit distributions of non-estate property in bankruptcy.

42. To be sure, the *Jevic* Court did not expressly consider whether the Code’s priority rules apply to “gifts” of purportedly non-estate property. But in rejecting the *Jevic* settlement, the Supreme Court demanded strict adherence to the rules established by Congress and laid bare the true harms of so-called “gifting.”¹¹ For at least two reasons, *Jevic* casts substantial doubt on *ICL*’s reasoning.

43. First, courts cannot approve distributions that deviate from the “basic system of priority” simply because the Code does not contain an express prohibition. The Supreme Court directly repudiated this line of reasoning when it rejected arguments that the priority rules apply only to chapter 11 plans. *See Jevic*, 580 U.S. at 465. Because the priority system is fundamental to the Code’s operation, any departure from it (whether in a structured dismissal, sale, settlement or other court-approved agreement) must come from Congress. *See id.* No such authorization exists for bankruptcy courts to approve priority-skipping gifts of non-estate property. The integrity of a comprehensive bankruptcy scheme, including the painstakingly-detailed priority rules governing distributions to creditors, cannot be cast aside in favor of creditor side deals. *See In re Lehman Bros. Holdings, Inc.*, 508 B.R. 283, 294 (S.D.N.Y. 2014) (“The Bankruptcy Code is meant to be a “comprehensive federal scheme . . . to govern” the bankruptcy process. Although

¹¹ The U.S. Trustee questions whether payments described as “gifts” in bankruptcy court filings are characterized as such in other records and reports, including in internal accounting records and reports to shareholders, taxing authorities, or regulators.

flexibility is necessary[,] the federal scheme cannot remain comprehensive if interested parties and bankruptcy courts in each case are free to tweak the law to fit their preferences . . .”) (citations omitted). Simply put, parties should not reap the benefits from the comprehensive bankruptcy process without also accepting its obligations, including the obligation to follow statutory priorities.¹²

44. Second, the Third Circuit in *ICL* failed to consider the full consequences of priority skipping distributions. By contrast, the Supreme Court exposed the harms that priority-skipping settlements inflict upon disfavored creditors and observed that departures from the Code’s priority rules—even in supposedly “rare” cases—run counter to the protections Congress granted particular classes of creditors. 580 U.S. at 470. Those statutory protections take precedence over even well-intentioned payments to junior creditors, and departing from them invites “collusion, *i.e.*, senior secured creditors and general unsecured creditors teaming up to squeeze out priority unsecured creditors.” *Id.* at (citing *Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle St. P’ship*, 526 U.S. 434, 444 (1999) (discussing how the absolute priority rule was developed in response to “concern with ‘the ability of a few insiders, whether

¹² The Supreme Court’s mention of *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007) does not alter this analysis. The Court made clear that “[*Iridium*] does not state or suggest that the Code authorizes nonconsensual departures from ordinary priority rules in the context of a dismissal—which is a *final* distribution of estate value—and in the absence of any further unresolved bankruptcy issues.” *Jevic*, 580 U.S. at 467 (emphasis in original). The interim nature of the *Iridium* settlement was a critical factor in the settlement’s approval. In *Iridium*, settling the litigation surrounding the secured lenders’ lien and distributing the proceeds to a litigation trust provided the estate with the ability to pursue an even more valuable claim, the proceeds of which would flow through the ordinary distribution scheme. *Iridium*, 478 F.3d 454. Here, however, the settlement is not necessary to fund the liquidation of other assets of the Debtor. The sale will transfer all assets to the Stalking Horse, leaving the estate with no assets. The settlement proceeds will simply flow to unsecured creditors and will not provide any potential of increasing the value of the estate. The *Iridium* settlement had the same qualities as interim payment to critical vendors in violation of the priority distribution scheme: the “distributions at issue would enable a successful reorganization and make even the disfavored creditors better off.” *Jevic*, 580 U.S. at 468 (citations omitted). That does not hold true here.

representatives of management or major creditors, to use the reorganization process to gain an unfair advantage” (quoting H.R. Doc. No. 93–137, pt. I, p. 255 (1973))). And by increasing uncertainty in the bankruptcy process, the failure to follow creditor priorities makes settlements more, not less, difficult to achieve. *Id.* at 471. When the Third Circuit evaluated the priority-skipping settlement on its merits in *ICL*, it did not consider the systemic harms that the Supreme Court found important when deciding *Jevic*.

3. This Court Should Apply *Jevic* Here.

45. Despite the fact that the parties are willingly permitting the final DIP order to be entered, the sale order to be entered and the sale to close without seeking approval of the settlement, and without requesting dismissal or conversion, the court should view the entire package. Specifically, the settlement contemplates the Committee’s agreement not to pursue Challenges, not to object to the DIP financing motion, including the releases therein, not to object to the Sale motion, including the sale of all causes of action, and the creation of a trust that will distribute the apparently only assets available for distribution, and the lack of any meaningful reorganization activity to occur in the bankruptcy cases after the sale closes. The approval of the sale and its closure is a necessary step to wash the proposed contributions to the trust of their ownership by the estate, thus permitting the fiction of a “gift” to arise. This is simply a multi-step process to conclude the cases with a final distribution of assets that violates the Code’s priority rules. Any finding otherwise promotes gamesmanship in the structuring of structured dismissals to evade *Jevic* and its ban on non-consensual, priority-violating final distributions.

46. Although the Committee claims that the settlement will maximize recoveries and is the only avenue for any recovery, that is irrelevant when there is no dispute that lower ranking creditors will receive distributions before higher ranking priority creditors without the senior

creditors' consent. Just as the Supreme Court rejected the supposed choice between a meaningful return or zero, so, too, must this Court. The United States Court of Appeals previously rejected the ability of senior creditors to "gift" what they claimed to be non-estate property – their distributions -- to junior creditors in a chapter 11 plan. *See In re Armstrong World Industries, Inc.*, 432 F.3d 507, 513-14 (3d Cir. 2005). The parties to the Committee Settlement Term do not explain why their "non-estate property" argument should fare better here. At bottom, the parties' proposal undermines the integrity of a comprehensive bankruptcy scheme.

47. The Supreme Court was concerned that permitting priority-skipping distributions would create serious consequences, including: departure from the protections Congress granted particular classes of creditors; changes in bargaining power of different classes of creditors; risks of collusion; and making settlements more difficult to achieve. *Jevic*, 580 U.S. at 470-71. The balance struck by the Bankruptcy Code is important because it standardizes an expansive and sometimes unruly area of law. *Id.* at 471.

48. Even if the assets to be transferred to a state-court trust *could* be deemed non-estate assets, permitting such "gifting" results in the very consequences that the Supreme Court sought to avoid in *Jevic*. Permitting a secured lender to "gift" assets to low-priority creditors creates uncertainty – how much is the secured lender really willing to pay for the assets? Who are they willing to pay? Have they offered the true value of the assets to the estate, or did they hold back knowing they would have to pay more to resolve objections? That uncertainty makes it less likely to achieve a settlement. *Id.* at 470.

49. Permitting lower-priority creditors to negotiate with the purchaser for the transfer of assets after the sale departs from the Congressional protections granted to creditors. Employees have been granted priority to encourage them not to abandon ship and to alleviate

hardship that unemployment causes. *Id.* Permitting settlements structures as “gifts” to avoid the need to pay these creditors first eliminates protections Congress built into the Bankruptcy Code.

50. This structure also likely results in high-priority creditors and low-priority creditors colluding to squeeze out mid-priority creditors.

B. *ICL* Does Not Apply to This Case

51. Even if this Court chooses not to revisit *ICL* after *Jevic*, the proposed structure of the Committee settlement cannot survive.. In *ICL*, the Third Circuit examined a settlement between an official unsecured creditors’ committee and a secured lender group. Under the terms of that settlement, the committee agreed to drop its objections to an asset sale where the secured lender group would acquire all the estate’s assets through a credit bid. In return, “the secured lenders agreed to deposit \$3.5 million in trust for the benefit of the general unsecured creditors.” 802 F.3d at 551. Under those fact specific circumstances, the Court found that the settlement payments were not “proceeds . . . of or from property of the estate” under section 541(a)(6) and, therefore, did not implicate the Code’s priority rules. *See Id.* at 556 (finding that “the settlement sums paid by the [secured creditors and] purchaser were not proceeds from its liens, did not ***at any time*** belong to LifeCare's estate, and will not become part of its estate even as a pass-through”) (emphasis added).

52. Here, the settlement consideration differs from *ICL* in critical ways. First, the settlement effectively releases the committee’s ability to challenge the validity, perfection, priority, extent, or enforceability of the secured lenders’ claims by allowing the DIP Order to become final and not asserting a Challenge. The committee could only mount such a challenge if it obtained derivative standing on behalf of and “for the benefit of the estate.” *See Cybergenics*, 330 F.3d at 580. Consequently, any consideration that the committee receives for the settlement of such claims belongs to the estate. By contrast, the settlement in *ICL* solely covered objections

relating to an asset sale and did not necessarily implicate the same derivative claim analysis.

53. Second, the settlement involves an ordinary carve-out where the secured lenders are permitting the use of a portion of their collateral. Savings of the carve-out are being distributed to the trust. In *ICL*, the Third Circuit strongly suggested that a gift through a carve-out from a secured lenders' collateral for the benefit of a junior class involves estate property. *See* 802 F.3d at 557 ("if we were [dealing with a carve-out], this would suggest it was LifeCare's property"). Here, the settlement calculates the amount of cash to be transferred by the savings of the carve-out. *ICL* counsels that these carve-out payments involve estate property, and therefore, the Code's priority rules expressly apply.

54. Third, the settlement involves the transfer of fraudulent transfer claims and commercial tort claims that belong to the estate. In *ICL*, the Third Circuit expressly considered whether specific cash transfers represented proceeds from the secured creditors' liens. *See* 802 F.3d at 556. Unlike cash transfers that may not have been traceable in *ICL*, the settlement in this case transfers non-cash litigation assets from the estate (whether directly or indirectly) to a litigation trust. Such claims must be traceable to the estate or else the party holding them has no ability to prosecute them. As such, *ICL* is inapplicable here. *See In re Constellation Enterprises LLC*, Case No. 16-11213, Hr'g Tr. at p. 248 (Bankr. D. Del. May 16, 2017) ("[A]ssuming *ICL* is still good law, assuming it has not been affected by *Jevic*, I find that this case is not controlled by *ICL* and doesn't fit *ICL* because the causes of action were property of the estate at one time. And the language [from the *ICL* opinion] makes a point in approving the transaction in *ICL* that it is important, among other things, that the transferred assets did not at any time belong to the Debtors' estate. So *ICL* is not applicable") (a copy of the transcript is attached as Exh.A).

55. Separate from the tracing issues, the Code created many of the underlying rights

for the estate in the first instance, as the transfer appears to include avoidance actions against parties who are not go-forward vendors. *See* 11 U.S.C. §§ 544-551. Permitting the sale of these claims and their subsequent assignment to unsecured creditors outside of priority undermines the Code's purpose and structure. In other words, the settlement distributes value derived from Code-created rights in violation of Code-specified priority.

56. Fourth, the settlement requires the purchaser to assume at least \$500,000 in Assumed Liabilities. Currently, the APA only requires up to \$250,000 of prepetition cure claims to be assumed by the purchaser.¹³ No business purpose is provided for the assumption of additional liabilities, and no transparency is provided as to who will be the beneficiary of these assumed claims. Indeed, the Purchase Price is defined to include the Assumed Liabilities, and thus, is value being provided to the estate for the estate's assets. Permitting the Stalking Horse to pay an additional purchase price but direct the payment to unsecured creditors where the payment of those claims is to resolve the Committee's objections and not for a going-forward business purpose, cannot be approved after *Jevic*.

57. For all of these reasons, the settlement distributes estate property even under *ICL's* most generous reading. Because *Jevic* directly forbids these distributions, this Court should deny the sale motion that incorporates aspects of the settlement.

¹³ Other assumed liabilities are liabilities that first arise after the closing.

III. CONCLUSION

For the reasons stated above, the Court should deny the Motion and grant any other such relief as may be just and proper.

Dated: February 21, 2025
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 AND 9

By: Linda J. Casey, Esq.

Linda J. Casey, Esq.

Trial Attorney

United States Department of Justice

Office of the United States Trustee

J. Caleb Boggs Federal Building

844 King Street, Suite 2207, Lockbox 35

Wilmington, Delaware 19801

Phone: (302) 573-6491

Fax: (302) 573-6497

Linda.Casey@usdoj.gov

Exhibit A

In The Matter Of:

In re: Constellation Enterprises, LLC, et al.

Hearing

May 16, 2017

Wilcox & Fetzer, Ltd.

1330 King Street

Wilmington, DE 19801

email: depos@wilfet.com, web: www.wilfet.com

phone: 302-655-0477, fax: 302-655-0497



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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)Chapter 11
)
Constellation Enterprises LLC,)Case Number
et al.,)16-11213 (CSS)
Debtors.)

Courtroom 6
824 Market Street, 5th Floor
Wilmington, Delaware
Tuesday, May 16, 2017
10:00 a.m.

BEFORE:

THE HONORABLE CHRISTOPHER S. SONTCHI, Judge

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www.wilfet.com

1 APPEARANCES:

2 ZACHARY I. SHAPIRO, ESQ.
3 MARCOS A. RAMOS, ESQ.
4 JOSEPH C. BARSALONA II, ESQ.
RICHARDS LAYTON & FINGER
One Rodney Square
5 920 North King Street
Wilmington, Delaware 19801
6 For the Debtors

7 CHRISTOPHER M. SAMIS, ESQ.
8 WHITEFORD TAYLOR PRESTON
405 North King Street, Suite 500
9 Wilmington, Delaware 19801

10 -and-

11 NORMAN N. KINEL, ESQ.
12 SQUIRE PATTON BOGGS
30 Rockefeller Plaza
New York, New York 10112
13 For the Official Committee of
Unsecured Creditors

14
15 LINDA CASEY, ESQ.
UNITED STATES TRUSTEE
16 844 King Street, Suite 2207
Wilmington, Delaware 19801

17
18 WARD BENSON, ESQ.
DEPARTMENT OF JUSTICE
19 Post Office Box 227
Ben Franklin Station
20 Washington, D.C. 20044
For the Internal Revenue Service



1 APPEARANCES, CONTINUED:

2 ROBERT J. DEHNEY, ESQ.
3 ANDREW R. REMMING, ESQ.
4 MORRIS NICHOLS ARSHT & TUNNELL
5 1201 North Market Street, 16th Floor
6 Wilmington, Delaware 19801

7 -and-

8 GARY L. KAPLAN, ESQ.
9 MATTHEW ROOSE, ESQ.
10 NANCY BELLO, ESQ.
11 FRIED FRANK
12 One New York Plaza
13 New York, New York 10004
14 For DDTL Parties

15 CHRISTOPHER D. LOIZIDES, ESQ.
16 LOIZIDES, P.A.
17 1225 King Street, Suite 800
18 Wilmington, Delaware 19801

19 -and-

20 JACK A. RAISNER, ESQ.
21 OUTTEN & GOLDEN
22 685 Third Avenue, 25th Floor
23 New York, New York 10017
24 For Trevor Miller

BLAKE CLEARY, ESQ.
YOUNG CONAWAY STARGATT & TAYLOR
1000 King Street
Wilmington, Delaware 19801

-and-

JASON P. RUBIN, ESQ.
SCOTT L. ALBERINO, ESQ.
AKIN GUMP STRAUSS HAUSER & FELD
One Bryant Park
Bank of America Tower
New York, New York 10036
For Secured Noteholders



1 APPEARANCES, CONTINUED:

2 ALESSANDRA GLORIOSO, ESQ.
3 DORSEY & WHITNEY
4 300 Delaware Avenue, Suite 1010
5 Wilmington, Delaware 19801
6 For Wells Fargo

7 SAMUEL C. BATSELL, ESQ.
8 PENSION BENEFIT GUARANTY CORPORATION
9 1200 K Street NW
10 Washington, DC 20005
11 For the PBGC
12
13
14
15
16
17
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19
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1 THE COURT: Good morning.

2 MR. SHAPIRO: Good morning, your
3 Honor. For the record, Zac Shapiro of
4 Richards, Layton & Finger here today on behalf
5 of the Debtors. With me at counsel table are
6 my colleagues, Mr. Ramos and Mr. Barsalona.
7 Behind me is Mr. Dana LaForge, who is among
8 other things a board member of Constellation.

9 We have two items on today's
10 agenda. The first is a joint motion filed by
11 the Debtor and the Committee to seek approval
12 of the settlement; and the second is what we
13 call the Committee's related mechanics motion.
14 We would propose to take those items in the
15 order which they're listed on the agenda.

16 We would also propose to get
17 right into evidence. We have one witness; the
18 Committee has one witness. And then after
19 each of us do our direct and redirect and our
20 cross and redirect, then we would get into
21 arguments of counsel. And at this point, I
22 would pause to see if that proposal is
23 acceptable to your Honor or other parties wish
24 to weigh in.



1 THE COURT: Anyone wish to be
2 heard on that?

3 MR. KAPLAN: Your Honor, if I
4 may, we had discussed with Debtor and the
5 Committee beforehand that we thought we brief
6 openings would be helpful just to frame the
7 testimony here, but obviously, we would defer
8 to your Honor.

9 THE COURT: Brief openings are
10 fine. I did read the briefs, so I'm aware of
11 the issues, obviously. But if people would
12 like to make openings, that's fine. So I'll
13 turn to the Debtors first and the Committee.
14 If you don't want to, that's fine, as well.

15 MR. SHAPIRO: Your Honor, I'm
16 going to make my opening very brief. I think
17 the papers made clear that at the very outset
18 of these cases, our goal was to achieve one or
19 more going concern sales of the Debtors'
20 businesses. And to do that, we needed
21 financing and a buyer or buyers. And it was
22 critical, in our view, to achieve those goals
23 that we obtain as much support as we could
24 from our key creditors. And just one day



1 before the August 16th hearing, which was at
2 that time the hearing on the approval of the
3 sales, and it was going to be the hearing on
4 approval of the DIP but we adjourned that into
5 later, and that was three months into the
6 case, we hadn't yet received final approval of
7 our DIP and neither of our sales were
8 approved.

9 And I think as the testimony
10 will make clear, at that stage, we didn't have
11 support for either sales or the DIP. And then
12 on the morning of August 16th, we were sent a
13 term sheet that not only resolved inner-
14 creditor disputes and provided funding to out
15 of the money creditors solely from non-estate
16 sources, but it resolved the Committee's
17 objections to the sales and the DIP.

18 And importantly, it also
19 resulted in the Committee supporting the sales
20 and the DIP, something that I think it's safe
21 to say carries a lot of weight in this court.
22 And to us, that sounded like a no-brainer. So
23 we agreed to the term sheet.

24 But it was clear that the term



1 sheet was still subject to further
2 documentation and finalization. In fact, the
3 record makes clear that counsel to each party
4 stated on the record in no uncertain terms
5 that there was still a lot of work that needed
6 to be done with respect to the settlement, and
7 the Debtors even expressly said we would work
8 in good faith to finalize it. In fact, it was
9 not until more than three weeks later that the
10 term sheet was finalized and filed with the
11 Court.

12 But what we really agreed with
13 on August 15th and 16th, and I think this is
14 important, is the concept. And the concept
15 was get the support from the Committee for
16 your sales and your DIP, give up nothing, and
17 get something for certain of your creditors,
18 but admittedly not for others. Or don't get
19 the Committee support for your sales and the
20 DIP. Give up nothing, and get nothing for
21 none of your creditors.

22 And I would submit, your Honor,
23 that really wasn't a difficult choice. Was it
24 a perfect settlement? No. We would not be



1 here today before your Honor if it were a
2 perfect settlement. Would it have been better
3 if the objectors in this room received what we
4 thought they were entitled to? Sure. Of
5 course, that would have been great. And the
6 record will reflect that we tried to help as
7 much as we could in that regard. But the fact
8 is, as is true in most Chapter 11 cases, the
9 Debtors didn't control the economics. We were
10 limited in what we could do.

11 But I don't think anyone can
12 credibly argue that the Debtors' decision to
13 enter into the settlement was anything but a
14 sound exercise in their business judgment, nor
15 can they argue the settlement does not fall
16 above the lowest point in the range of
17 reasons.

18 And I think that's it from me,
19 your Honor. Thank you.

20 THE COURT: You're welcome.

21 MR. ABER: Good morning, your
22 Honor. Norman Kinel, Squire Patton Boggs, on
23 behalf of the Creditors' Committee.

24 I don't have much to add to what



1 Mr. Shapiro had to say. We're obviously the
2 co-movant on the settlement motion. We
3 brought our own motion which we referred to as
4 the mechanics motion, which to some degree was
5 precipitated by the first round of objections
6 where the objecting parties wanted to know
7 exactly what the mechanic would be for
8 distribution of the settlement proceeds,
9 assuming it was approved by this Court.

10 I think your Honor, and I think
11 the reasons that the Debtors and the Committee
12 didn't see the need for opening statements, I
13 think there's going to be a lot of noise in
14 the courtroom today, not necessarily loud, but
15 a lot of things that are distracting for
16 what's really at issue before the Court. And
17 what's at issue before the Court is approval
18 of the settlement, and the standard for
19 approval is, as we all know, pretty low. Not
20 that I think this is even close to approaching
21 the lowest level, but certainly we believe
22 that both the Debtors and the Committee, to
23 the extent relevant, entered into a
24 hard-fought, good-faith settlement after



1 lengthy negotiations, primarily between the
2 Committee and the noteholders, and that the
3 parties, the constituency that we represent,
4 the Unsecured Creditors Committee, this
5 settlement is the only last-best-chance hope
6 for obtaining substantial consideration,
7 consideration that would not have been
8 predicted to have been possible to obtain at
9 the outset of the cases given the huge amount
10 of debt that came before unsecured creditors.
11 And that only through the Committee's efforts
12 in pressing its objections to the DIP, to the
13 sale motions, and conducting investigations
14 and doing all that a Committee should do, has
15 the results which we're seeking approval of
16 come before your Honor for approval.

17 We took a long detour easily
18 referred to as the Jevic detour. We're back
19 we believe where we started, and as we'll get
20 into argument at closing, we don't believe
21 that Jevic is relevant or in any way
22 precluding the Court's approval of the
23 settlement, and we believe that, frankly, it
24 should be almost a routine matter to approve



1 this type of settlement given the binding
2 third circuit precedent at LCI.

3 And as to the mechanics motion,
4 your Honor, the Committee is faced with
5 economic realities that there was never a bar
6 date set in these cases and that there is a
7 claims resolution process that needs to occur,
8 we're asking the Court to approve a mechanism
9 which we think is fair with respect to which
10 all creditors have been on notice for many,
11 many months, and the only parties who have
12 ever objected are sitting in this room. And
13 we think it's an efficient way to get a
14 substantial distribution to unsecured
15 creditors in these cases. Thank you.

16 THE COURT: Mr. Kaplan?

17 MR. KAPLAN: Thank you. Good
18 morning, your Honor. For the record, Gary
19 Kaplan from Fried, Frank, Harris, Shriver &
20 Jacobson on behalf of the DDTL parties.

21 First, your Honor, I wanted to
22 start with one of the issues that was covered
23 in the reply and one of the reasons why I
24 wanted some openings was there's a lot of the



1 argument that the Debtors and the Committee
2 make is, well, the APA always provided that
3 certain of these assets were going to be sold,
4 and that's all that's relevant is look at what
5 the APA said, and we're trying to relitigate
6 the APA. We're not trying to relitigate the
7 APA. We understand what the APA said, but
8 that's besides the point.

9 Because what we're here on today
10 is a settlement term sheet. And the record is
11 going to show, and we put it in our brief and
12 it will come very clear as we go through the
13 testimony today, when the Debtors and the
14 Committee announced that they had a
15 settlement, there were assets that were going
16 to be left behind by the purchaser in the
17 estate and then the estate was going to be
18 distributing out. That is what was announced
19 in court on August 16th. That is the
20 settlement that was approved by the Debtor and
21 the Committee.

22 And we're going to also show
23 that then after that, because of Jevic or
24 otherwise , it changed, so that assets that



1 were going to be left in the estate, plainly
2 estate assets that had agreed to be carved
3 out, were now going to be sold to the
4 purchaser and immediately contributed back to
5 the Debtor.

6 And when the Committee and the
7 Debtor want your Honor to consider this, they
8 sort of want to you bifurcate pieces of the
9 settlement which you're assessing. What we
10 argue is when you're looking at the claims and
11 causes of action, you can't look at anything
12 today because clearly the sale has closed, the
13 DIP has been assumed by the purchaser, so you
14 have to step back and look at the world on
15 August 16th when they stood up in court and
16 announced the settlement. That's when they
17 argue you have to look at the claims that are
18 being settled. But don't look at the facts
19 and what was agreed to on the 16th, because
20 that would run smack into Jevic and that would
21 be impermissible.

22 So they want you to sort of
23 bifurcate how you look at the settlement and
24 what you look at the settlement. And frankly,



1 we don't think there's any precedent for that.

2 Now, Mr. Kinel mentioned you're
3 going to hear a lot of noise today. Well,
4 that noise is the facts. They may be
5 inconvenient, they may be unhelpful to the
6 Debtors, but that's what you're going to hear.

7 In terms of the settlement and
8 the Martin factors and the Committee's
9 argument that this was a home run considering
10 where, you know, what their claims were, we
11 think that sort of misses the point on this.
12 Because what we're really not talking about is
13 a settlement. What we are talking about is
14 effectively a distribution scheme to wrap up
15 the Chapter 11 case. You have a Debtor who as
16 the testimony show cannot, has no hope of
17 confirming a plan. So they have to figure out
18 a way, how do we get out of Chapter 11, and
19 that's what they created. They've done it
20 under the guise of 9019 and they're trying to
21 use the 9019 standard, but we're not talking
22 about a settlement, because as the facts will
23 show, there was really nothing to be settled.
24 The challenge period had expired. There were



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1 no claims against the noteholders. They say,
2 oh, look at what we extracted from them, they
3 had to release them. There were no claims
4 against them. They were negotiating a
5 distribution mechanism, and that's it.

6 And then lastly, in terms of the
7 Debtors' business judgment, the record is
8 going to be pretty clear that the Debtor, as
9 they said and it says in the declaration, they
10 had a take it or leave it proposition right
11 before the hearing. They said, hey, it's
12 better than nothing, it gets our DIP and our
13 sale approved, we'll take it. That may be
14 fine, maybe the Debtor can do it, it wasn't
15 conditioned, none of those orders were
16 conditioned on approval of the settlement, so
17 I'm not criticizing them for making that
18 judgment. But this Court has a role in
19 reviewing that settlement and looking at it,
20 saying, okay, it's nice they did it, they got
21 their sale approved, but is it the appropriate
22 thing and does it actually comply with the
23 law?

24 And it's important to consider,



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1 as Mr. Shapiro said, the Debtors had already
2 addressed the DIP objection. We're not
3 talking about an exigent circumstance with a
4 deadline blowing up where they were about to
5 lose the DIP. They had already moved a
6 deadline or, I'm sorry, moved the hearing on
7 the DIP. So it wasn't an exigent situation
8 where they could have taken time to actually
9 negotiate.

10 And one other point is that, and
11 the Committee has already made the point and
12 will continue to make the point, if this
13 settlement is denied, there's going to be a
14 windfall to noteholders and the creditors are
15 going to be out and they're not going to get
16 anything. You know what, your Honor? It's a
17 little bit like the child that kills his
18 parents and then begs mercy because they're an
19 orphan. The Committee and the Debtor
20 structured this in this way. Evidence will
21 show it wasn't the noteholders who insisted
22 you must skip priority claimants, you must
23 skip the DDTL parties deficiencies. The
24 Committee and the Debtors decided, gee, maybe



1 we can try to get around Jevic if we structure
2 it this way, then they'll beg and say, well,
3 Judge, but if you deny it, then we won't get
4 anything. They could have simply accepted the
5 terms that the noteholders proposed and said,
6 yeah, we'll make it correct amongst creditors,
7 we'll follow the absent priority rule. If
8 they did that, we wouldn't have an objection,
9 none of the parties on this side would have an
10 objection. They chose to go down that path,
11 your Honor, and whether the outcome ultimately
12 is negative for them, you know, we make
13 strategic decisions all the time, and they
14 have to live with those strategic decisions.

15 So to avoid beings repetitive,
16 in closing I will address ICL and Jevic and
17 all those other issues. Thank you.

18 THE COURT: Ms. Casey?

19 MS. CASEY: Good morning, your
20 Honor. Linda Casey on behalf of the United
21 States Trustee.

22 Your Honor, while we have some
23 technical objections to both the settlement
24 motion and the procedures motion, I think the



1 main issue today can be framed by the
2 following: Can the Supreme Court's Jevic
3 decision be interpreted so narrowly as to
4 permit an end-of-case priority skipping
5 distribution of assets by finding that the
6 consideration paid to resolve objections to a
7 sale and thereby permit the sale to move
8 forward are not estate assets, and therefore
9 continue the harms that the Supreme Court
10 attempted to avoid, altering the balance
11 struck by the code; changing the parties'
12 negotiating positions; decreasing the
13 likelihood of settlement; and increasing the
14 uncertainty of distributions resulting in a
15 battle between all parties to obtain the
16 purported side deals or gifts provided by the
17 purchaser?

18 THE COURT: Thank you,
19 Ms. Casey:

20 MR. RAISNER: Good morning, your
21 Honor. Jack Raisner on behalf of the WARN
22 class.

23 We have joined in Ms. Casey's
24 objection and made our own. I just want to



1 highlight a chief concern of ours. Regardless
2 of whether this is a gifting case or this is
3 not quite a Jevic case and may be a Jevic
4 case, the way which the distribution of
5 proceeds have been set up in a lopsided way,
6 which has none of the hallmarks of fairness,
7 of a disinterested broker looking over the
8 process, puts the employees' claims fully to
9 the discretion of the Debtor and the
10 noteholders and control that process and all
11 the decisions that are made, except
12 potentially for a person who would come for a
13 full hearing in court. But that is not a
14 convention that belongs within any Bankruptcy
15 Code or bankruptcy resolution, your Honor.
16 Thank you.

17 THE COURT: Thank you, sir.

18 Anyone else?

19 MR. RAMOS: Good morning, your
20 Honor. Marcos Ramos, Richards, Layton &
21 Finger.

22 Your Honor, as Mr. Shapiro
23 indicated, we intended to call Debtors'
24 witness first on the settlement motion.



1 THE COURT: Okay.

2 MR. RAMOS: Then we would be,
3 after the other parties are finished,
4 proceeding with the Committee witness on that
5 motion, as well. The Debtors' witness is Mr.
6 Dana LaForge. And your Honor, we included in
7 the binders that we provided to the court and
8 to the clerk the Debtors' exhibits. Volume 3
9 includes the declaration of Mr. LaForge. It's
10 volume 3, and it's Exhibit 13 in volume 3. I
11 have some extra copies of the declaration
12 itself, if I can approach.

13 Your Honor, the declaration of
14 Mr. LaForge was filed shortly before the
15 December hearing at which the settlement
16 motion was last considered by the Court. We
17 intend to proceed by way of his declaration in
18 terms of offering it as his direct testimony
19 with only a few limited follow-up questions.
20 We've advised the parties of that, and there's
21 no objection to proceeding in that fashion.

22 THE COURT: Any objection to the
23 admission of the declaration? Okay; it's
24 admitted without objection.



1 MR. RAMOS: And we would call
2 Mr. LaForge to the stand, your Honor.

3 THE COURT: Okay, very good.
4 Mr. LaForge, if you would step up to the
5 stand, remain standing for your affirmation.

6 DANA LAFORGE, after
7 having been first duly sworn, was
8 examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. RAMOS:

11 Q. Good morning, Mr. LaForge.

12 Mr. LaForge, can I ask you to
13 pull out the binder that I was just referring
14 the Court to? It's identified as binder 3 of
15 3. And in that binder, ask you to turn to
16 what's identified as Debtors' Exhibit 13.

17 A. I'm there.

18 Q. Sir, can you identify that document
19 for the record?

20 A. Yes. It's the declaration I submitted
21 in December.

22 Q. Are you familiar with the contents of
23 that declaration?

24 A. I am.



1 Q. Can I ask you to take a quick look at
2 paragraph 1?

3 A. Okay.

4 Q. And would you please describe whether
5 the information set forth in paragraph 1 is
6 accurate as of today?

7 A. It's all accurate. It leaves out the
8 fact that I'm also the chairman and sole
9 director of all those companies.

10 Q. With that caveat, Mr. LaForge,
11 regarding your position with the Debtors, do
12 you affirm the contents of this declaration as
13 your testimony today in support of the joint
14 settlement motion?

15 A. I do.

16 Q. Mr. LaForge, let me ask you to stay in
17 binder 3 and ask you to turn to tab 9.

18 A. I'm there.

19 Q. And I'd ask you to turn two pages in
20 or so into the document and ask you if you can
21 identify that document.

22 A. I can identify it. It's our motion to
23 approve the settlement.

24 Q. And is this the motion under which



1 you're today appearing?

2 A. It is.

3 Q. And let me refer you to Exhibit A to
4 that motion, and Exhibit 1 to Exhibit A, two
5 or three pages into what's under Exhibit A.

6 A. Okay, I'm there.

7 Q. And sir, are you familiar with that
8 document?

9 A. I am.

10 Q. What is it?

11 A. This is the executed version of the
12 settlement term sheet.

13 Q. And is this the settlement agreement
14 for which the Debtors and the Committee
15 jointly today seek Court approval?

16 A. Yes, it is.

17 Q. Sir, just stay on page 1 of the
18 settlement term sheet, about three or four
19 paragraphs down. See the reference to CD Star
20 Holdings, LLC?

21 A. I do.

22 Q. It refers in that same paragraph to an
23 APA, correct?

24 A. Yes, it does.



1 Q. And sir, do you know, has the closing
2 occurred?

3 A. The closing occurred in late November.

4 Q. Do you remember the date that that
5 closing occurred?

6 A. The date?

7 Q. In November?

8 A. I believe it was -- the document is
9 dated the 28th of November.

10 Q. Sir, to your knowledge, was the APA
11 referred to here in the settlement term sheet,
12 was that amended prior to the closing?

13 A. My understanding is it was amended
14 prior to the closing.

15 Q. May I ask you to turn to tab 16 in the
16 same binder that you have before you?

17 A. I'm there.

18 Q. And sir, can you identify that
19 document?

20 A. Yes, this is its amended asset
21 purchase agreement that I was referring to.

22 Q. You're familiar with this document,
23 sir?

24 A. I am.



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1 Q. Is it your understanding this is the
2 final form of the APA referred to in the
3 settlement term sheet?

4 A. Yes, that's my understanding.

5 Q. I'm going to ask you to do a little
6 flipping back to tab number 9 for me, sir.
7 And back to the settlement term sheet that you
8 were just discussing.

9 A. I'm there.

10 Q. And, sir, do you know whether or not
11 under the settlement term sheet an escrow
12 agreement was contemplated?

13 A. It was.

14 Q. And do you know in connection with the
15 closing we were just referring to whether that
16 agreement was executed by the Debtors?

17 A. It was executed, yes.

18 Q. Let me ask you to turn to tab 17.

19 A. Okay, I'm there.

20 Q. Are you familiar with that document,
21 sir?

22 A. I am.

23 Q. And can you just describe what it is
24 for the record?



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1 A. Yes. As part of the settlement, there
2 was some funding as part of the settlement
3 that needed to be put into escrow, and this is
4 the agreement that contemplated that.

5 Q. To your knowledge, sir, is that the
6 final form of the escrow agreement executed by
7 the Debtors as of the closing?

8 A. Yes, it is.

9 Q. Thank you. One last question from me,
10 Mr. LaForge. Tab number 9 again; I'm sorry.
11 Put you right back where I started you.

12 A. Okay.

13 Q. Let me ask you to turn to page 3 on
14 the settlement term sheet.

15 A. Okay, I'm there.

16 Q. It's page number 3 at the bottom. And
17 sir, you see the second bolded header on the
18 left-hand side called Claims and Causes of
19 Action?

20 A. I do, yes.

21 Q. And that long paragraph, that's next
22 to it, right?

23 A. I do, yes.

24 Q. Let me refer you to the last sentence



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1 of that long paragraph, sir. Have you
2 reviewed that, sir?

3 A. I have, yes.

4 Q. Sir, can you just clarify for me, are
5 the Debtors today asking the Court to approve
6 the Debtors' contribution of any claims or
7 causes of action to the trust?

8 A. We are not.

9 Q. And sir, have the Debtors considered
10 whether to add a clarifying provision to that
11 effect in the proposed order that they will
12 submit to the Court in connection with this
13 joint settlement action?

14 A. I believe we have added that
15 clarification to the order, and have indicated
16 that they would be prepared to augment that as
17 any matter that would be helpful.

18 MR. RAMOS: Thank you,
19 Mr. LaForge.

20 Your Honor, subject to redirect,
21 I'll pass the witness to the objecting
22 parties.

23 THE COURT: All right.

24 MR. KAPLAN: Good morning, your



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1 Honor. Your Honor, for the record, again,
2 Gary Kaplan, Fried Frank.

3 Your Honor, because we haven't
4 killed enough trees, we also have our own
5 witness binder, if we may approach the witness
6 and your Honor to hand out the binders.

7 THE COURT: Yes.

8 CROSS-EXAMINATION

9 BY MR. KAPLAN:

10 Q. Good morning, Mr. LaForge. As you
11 know, Gary Kaplan from Fried Frank on behalf
12 of the DDTL parties.

13 I want to start actually back on
14 August 16th. At the hearing on August 16th,
15 the Debtors announced that a settlement had
16 been reached, correct?

17 A. Correct. Yes, an agreement to move
18 forward and consummate the settlement that had
19 been agreed to, yes.

20 Q. And the first that you had learned
21 that settlement had been reached was actually
22 the morning of August 16th, right?

23 A. Of that settlement and that structure,
24 yes.



1 Q. You were at Richards Layton's offices
2 when you learned of it?

3 A. I was.

4 Q. And at that point in time, you weren't
5 the sole director of the Debtors, right?

6 A. That's correct, I was not.

7 Q. Mr. Dennis Smith was the other
8 director?

9 A. That's correct.

10 Q. But Mr. Smith wasn't present in
11 Delaware at that time, was he?

12 A. He was not.

13 Q. And just to be clear, you were not
14 involved in any way in the negotiation of the
15 August 16th term sheet, correct?

16 A. Of that term sheet, no.

17 Q. And you were, in fact, completely
18 unaware of the structure of the term sheet,
19 meaning use of the trust and the contribution
20 of assets or cash, prior to receiving it on
21 the morning of the 16th, right?

22 A. That structure was new to me on the
23 16th, yes.

24 Q. And so then after receiving the term



1 sheet that morning of the 16th, you then came
2 to the courthouse for the hearing, right?

3 A. Correct.

4 Q. And when you got to the courthouse, it
5 was your first chance to actually discuss the
6 term sheet at all with any of the
7 representatives, correct?

8 A. That's right.

9 Q. And prior to the start of the hearing,
10 you had a brief conversation with Committee
11 counsel about the term sheet, right?

12 A. I did.

13 Q. But because of the time constraints of
14 the start of the hearing, you were somewhat
15 limited in the amount of time you could
16 discuss it, right?

17 A. That's correct.

18 Q. And in that brief conversation, there
19 was one item of the term sheet that you were
20 attempting to negotiate, right?

21 A. Yes, there was a -- yes.

22 Q. And that item was expanding the
23 released parties under the term sheet?

24 A. That's correct.



1 Q. But the Committee wasn't prepared to
2 negotiate any of the terms with you, were
3 they?

4 A. The Committee was not prepared to
5 discuss the term that I raised, and so, yeah,
6 there was the term sheet that was given to me
7 was the one that we had to make a choice on.

8 Q. Okay. And you didn't talk to the
9 noteholders prior to the start of the hearing,
10 did you?

11 A. That morning? Not between receiving
12 the term sheet or the concept of the term
13 sheet and the hearing, no.

14 Q. And so you don't know, between that
15 time, you don't know whether the noteholders
16 would have been willing to make any
17 modifications to the term sheet, do you?

18 A. I don't know.

19 Q. And the Debtors didn't seek to adjourn
20 the August 16th hearing to have more time to
21 try to negotiate, did they?

22 A. We did not.

23 Q. Okay. And then after receipt of the
24 term sheet and your conversations, at some



1 point, the Debtors approved the term sheet,
2 right?

3 A. It actually was a little bit
4 different. We had had a discussion among the
5 directors. We had had a discussion before,
6 and I don't recall if we had one afterwards,
7 but we had a -- the directors, which were only
8 two, had a discussion about how we would
9 handle each of the alternatives. That is that
10 term sheet or, you know, one with changes.

11 Q. And let's take a look at the August
12 16th term sheet. If you could turn to tab 20
13 in your binder.

14 A. I have it.

15 Q. And you see that the cover page of
16 this document is an email transmittal from
17 Ms. Hazan, counsel to the Committee, to a
18 number of parties saying here's a black line,
19 the term sheet showing changes to circulate
20 this morning?

21 A. I do.

22 Q. And is this -- obviously a clean
23 version, but is this version of the term sheet
24 like the board approved on the 16th?



1 A. Yes. This is the version of the term
2 sheet that the board agreed to give our
3 commitment that we would work forward to
4 documentation to apply the concept, yes.

5 Q. But it's the one that the board
6 members met and decided --

7 A. That's correct.

8 Q. And approved?

9 A. Yes.

10 Q. And this term sheet provided for --
11 this term sheet changed over time from the one
12 you're seeking approval of today, right?

13 A. Yes, it did.

14 Q. And were there any significant changes
15 to the terms?

16 A. The concept never changed that we
17 agreed to, no.

18 Q. And when you say the concept never
19 changed, could you just be more specific about
20 what it is that you're referring to?

21 A. Sure. There were -- this was simply,
22 this was what it was. And as we documented,
23 we drilled, my understanding is, between the
24 sides, they drilled down the language to



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1 accurately document the verbal discussions
2 that our counsel had had prior to me coming to
3 the courthouse and talking to the Committee
4 counsel.

5 Q. Wasn't it your understanding when you
6 approved the term sheet that none of the
7 Debtors' assets were going to be distributed?

8 A. Yeah, that is my -- that was my
9 understanding, yes.

10 Q. And your understanding was because all
11 the assets were going to be sold to the
12 purchaser, so it was up to the purchaser and
13 the Committee how they were going to allocate
14 the assets, right?

15 A. That's correct.

16 Q. And were you aware at the time that
17 the term sheet contemplated that the APA would
18 be amended so that certain assets of the
19 estate would be excluded assets and remain
20 back in the Debtors' estate?

21 A. I don't think that's -- let me try to
22 answer, see if I've accomplished what you
23 want. I was -- in a deposition, I
24 acknowledged that I was unaware of the



1 mechanic that the assets that were being sold
2 to the purchaser would get to the trust.
3 There was never, as part of this transaction,
4 a situation where assets were coming back to
5 the Debtor for the Debtor to do something
6 with.

7 The concept, as I referred to
8 it, was that assets would be contributed,
9 assuming the purchase was approved, those
10 assets purchased by the buyers, the
11 purchasers, would then be contributed to the
12 GUC. The mechanism of how that happened was,
13 quite frankly, not a big discussion that
14 morning.

15 Q. You testified on direct that you're
16 familiar with the asset purchase agreement,
17 correct?

18 A. I am, yes.

19 Q. And are you familiar with the concept
20 of excluded assets?

21 A. I am.

22 Q. I'd like you to turn to page 2 of the
23 term sheet, and in particular the side where
24 it says claims and causes of action.



1 A. Yes.

2 Q. And if you see there at the beginning,
3 it says, "The purchaser shall cause the APA to
4 be amended at closing so that the following
5 shall be excluded assets under the APA." Do
6 you see that?

7 A. That's what it says, yes.

8 Q. So doesn't that mean that the term
9 sheet that you agreed to on the 16th
10 contemplate that had certain assets would be
11 excluded assets and thus remain with the
12 Debtor under the APA?

13 MR. RAMOS: Objection, your
14 Honor. It mischaracterizes the term sheet,
15 pause it was an incomplete referral to the
16 term sheet, his question, because he omitted
17 the clause after the term APA. But he's
18 calling for a legal conclusion in addition to
19 that.

20 THE COURT: Overruled.

21 THE WITNESS: Would you repeat
22 the question, please?

23 BY MR. KAPLAN:

24 Q. Sure. Doesn't the term sheet that you



1 approved on the 16th provide for the APA to be
2 amended so that certain assets would be
3 excluded assets from the APA to remain back
4 with the estate and then contributed to the
5 GUC trust?

6 A. The mechanism was not something we got
7 into that morning. The discussion was whose
8 assets would end up in the GUC trust. The
9 settlement agreement would only be relevant if
10 the purchase agreement was approved. If the
11 purchase agreement was approved, then there
12 were no assets that the Debtor estate would
13 still have that would be contributed. In my
14 mind, that language there was simply a
15 mechanism to distribute the assets which would
16 or wouldn't work to be determined by the
17 professionals, legal professionals, when they
18 had time. We never assumed that the assets
19 were being contributed back to the estate for
20 it to, you know, for it to do something with.

21 Q. Why not? I mean, doesn't the term
22 sheet clearly say that they are going to be
23 excluded assets?

24 A. We were very interested that morning



1 in whether or not there were any estate assets
2 being contributed. There was a fulsome
3 discussion about that. Not about the term
4 sheet, but about whether or not any of our
5 assets would be included. And it was
6 presented to me by our counsel that the very
7 fact it wasn't helped make this a term sheet
8 that we could consider.

9 So the thought that there might
10 be language that if I went back and mapped to
11 a definition would imply something to a
12 different reader wasn't the issue. I had a
13 concept in mind. I confirmed verbally that
14 that was the concept, and we ensured that by
15 the time we had an executed version, that
16 that's what was in the agreement.

17 Q. By prior to receiving the term sheet,
18 you never heard of the concept that is in the
19 term sheet, right?

20 A. I hadn't seen the structure.

21 Q. So how could you have a concept of
22 mind of what the term sheet would provide
23 until you got the term sheet and read it and
24 understood what it provided for?



1 A. The discussion, I think the way, if
2 you can imagine the way this would play out in
3 the offices that morning, was there was a term
4 sheet. The time on this term sheet was 10:23.
5 I don't know what time the hearing was; I
6 believe it was a late morning hearing. The
7 discussion wasn't about the language as much
8 as that the board was involved with, it was
9 about the concept. The concept was that the
10 purchasers would contribute their, the assets
11 that they would have acquired under the APA,
12 and they would contribute that to the GUC
13 trust. If I thought for a moment there was a
14 chance I could get those assets back, I would
15 have done that. I would have tried to do
16 that.

17 Q. And you didn't try to do that, though,
18 after receiving and approving this timesheet,
19 did you?

20 A. I did not try to do that; that's
21 correct.

22 Q. Now if we could turn to tab 21?

23 A. I'm there.

24 Q. You see there's a cover email, and



1 this one comes from Nava Hazan to Kramer Levin
2 and to Akin Gump attaching another draft of
3 the term sheet, right?

4 A. Yes.

5 Q. And this one says attached is the
6 draft term sheet that reflects the agreement
7 reached yesterday, right?

8 A. It does, yes.

9 Q. Let's turn to, just going to the same
10 provision we just looked at on page 2, this
11 term sheet continues to provide that same
12 language about the APA being amended so that
13 certain assets would be excluded assets under
14 the APA and contributed to the GUC trust,
15 right?

16 A. It does, yes.

17 Q. Do you remember reviewing this term
18 sheet?

19 A. I don't remember reviewing this term
20 sheet.

21 Q. Let's turn to 21; tab 21.

22 A. We're on 21.

23 Q. I'm sorry, 22.

24 MR. KINEL: Excuse me, your



1 Honor, I'm going to object at this time. I
2 could save it until the end, but if Mr. Kaplan
3 is going to go through numerous iterations of
4 term sheets, the objection is relevance.

5 What's before the Court today is the
6 settlement term sheet that was marked by
7 Mr. Ramos earlier, not these drafts.

8 THE COURT: Overruled,
9 Mr. Kinel. Of course it's relevant.

10 BY MR. KAPLAN:

11 Q. Mr. LaForge, if you could turn to the,
12 again, the language on claims and causes of
13 action. Actually, before you get there, to be
14 clear, if you go to the first page, this is
15 actually an email from Kramer Levin, Debtors'
16 counsel, to the other parties, the purchaser
17 and the Committee, right?

18 A. That is, yes, that's the email.

19 Q. And then if you turn, we'll go to the
20 black line because it's easier to see the
21 changes, so page 2 of the black line?

22 A. Yes.

23 Q. You see that the Debtors have added in
24 some language into that provision that we've



1 been focused on, right?

2 A. I see the changes that, yeah. It's a
3 KL draft, yes.

4 Q. And in particular, the Debtors,
5 Debtors' counsel drafted to this draft term
6 sheet was clarification that these assets
7 which were going to be excluded assets would
8 be contributed to the GUC trust by the
9 debtors. Do you see that?

10 A. I see that, yes.

11 Q. Were you aware that at least your
12 counsel was continuing to propose that the
13 Debtors would be receiving these assets and
14 contributing them to the GUC trust after you
15 had approved the settlement?

16 A. I can't -- I don't recall reviewing
17 any of these term sheets from the first one we
18 saw to the last one. I don't know what the
19 thinking of the marked change was. It reads
20 as you read it. I know what the board
21 approved, and I know what the final term sheet
22 said, and I'm just afraid I can't get at this
23 with any more information than what it says on
24 the page.



1 Q. And the board certainly, as far as
2 you're aware, didn't authorize this change,
3 did it?

4 A. I don't recall seeing this, so no, the
5 board would not have approved interim
6 drafting.

7 Q. We may get back to the term sheets,
8 but we can move to another topic for a few
9 minutes.

10 Do you have your declaration in
11 front of you still?

12 A. I'm sure it's...

13 Q. 13.

14 A. 13 of 3?

15 Q. Yes.

16 A. I have it.

17 Q. I'd like to you turn to paragraph 22,
18 if you would, which is on page 6.

19 A. I'm there.

20 Q. All right. You see in there you
21 testify that the terms of the settlement are
22 fair and reasonable, right?

23 A. I see that, yes.

24 Q. Do you remember being deposed a couple



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1 of weeks ago?

2 A. I do.

3 Q. And do you remember that we had a
4 dialog about whether it was fair or not?

5 A. I do.

6 Q. And do you recall saying that you
7 couldn't answer whether the settlement was
8 fair?

9 A. I recall telling you I wouldn't answer
10 the question the way you had phrased it.

11 Q. And do you recall why you said that?

12 A. Yes, because the question was getting
13 at an equitable -- in my mind, it was a
14 question about equity that was not a matter
15 that the board or I would have considered at
16 the time. I'd be happy to entertain the
17 question again, but that's the best
18 recollection I have.

19 Q. Okay. Do you recall that I asked you
20 whether the allocation of value to some
21 creditors and not others was fair?

22 A. I do recall that, yes.

23 Q. And do you recall saying that you
24 could not answer that question?



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1 MR. RAMOS: Your Honor, perhaps
2 he could refer him to his deposition
3 transcript.

4 MR. KAPLAN: Yeah, I was going
5 to ask him the question first.

6 THE WITNESS: Yeah, it would be
7 helpful to see it. Thank you.

8 MR. KAPLAN: May I approach,
9 your Honor?

10 THE COURT: Sure. Thank you.

11 BY MR. KAPLAN:

12 Q. And in particular, let's go to the
13 bottom of page 48, line 24. Let me know when
14 you're there.

15 A. I'm sorry, 48?

16 Q. Yeah, page 48, then there's a question
17 beginning on line 24. Mr. Diaz asked you,
18 "But sitting here today, you're not prepared
19 to say that the settlement, that the
20 allocation of value in the settlement to some
21 creditors and not others is fair?" Mr. Ramos
22 objected. Then you can read your answer. And
23 you can read it out loud and tell me if it's
24 changed.



1 THE COURT: It's a long answer.

2 THE WITNESS: I was criticized
3 for that.

4 MR. RAMOS: Your Honor, I'd just
5 note, as well, that he directed him to 24,
6 starting in line 24. For completeness, it may
7 be appropriate to direct the witness starting
8 at line 8 of the same page, 48.

9 BY MR. KAPLAN:

10 Q. I'm happy to start there, if that's
11 easier. You can start at page 48, line 7, to
12 avoid the objection; that's fine. Again, it's
13 going to be another long answer.

14 THE COURT: All right, read to
15 us.

16 THE WITNESS: Would you like me
17 to read it out loud?

18 BY MR. KAPLAN:

19 Q. Read it and tell me if that's still
20 your view today.

21 A. I'm sorry, am I being asked to read it
22 out loud or just read it?

23 Q. Yeah, you can read it out loud and let
24 me know if that's still your testimony today.



1 A. I want to go back before 7 to get the
2 question.

3 Q. Let me know where you need to start.

4 A. Maybe someone can help me.

5 Q. You can start, if you'd like, on 46.

6 A. Yeah, yeah. So look, starting on 47,
7 the question is, you were going to the
8 fairness, and I don't recall if it was earlier
9 or later, but we certainly talked about a
10 settlement, a more wholesome settlement that I
11 would have much preferred. And I believed
12 what you were asking here was whether in my
13 heart of hearts I personally thought this was
14 fair.

15 And I had said what -- and I
16 believe at some point in this, I referred to
17 that I had a responsibility when I came to
18 work every day, and what I would have
19 preferred to see, I had to leave at home. And
20 the determination at the time we had this term
21 sheet was given the situation we were facing,
22 which was we had vendors, all the normal
23 constituents in any operating company,
24 vendors, employees, clients, customers, et



1 cetera. And we were trying to preserve the
2 value of the ongoing operation, that with the
3 decision we had in front of us, which is what
4 I believe we get at on page 6, paragraph 22 of
5 my declaration, was that was a fair
6 determination of what the right thing to do
7 was for the -- taken as a whole for the
8 estate. It is not, and I have not ever tried
9 to imply, that it is the agreement that I
10 would have drafted myself.

11 I'm sorry if I didn't answer
12 your question.

13 Q. Yeah, just go to the basic question,
14 which is do you believe that the terms of the
15 settlement, including the disparate treatment
16 of unsecured creditors, is fair?

17 MR. RAMOS: Objection, your
18 Honor. No foundation in terms of the
19 disparate treatment issue embedded in this
20 question.

21 THE COURT: Overruled.

22 THE WITNESS: I'm sorry, I've
23 got to get some context, a little more context
24 for the question. And I'm sorry that I need



1 to do that, but I do.

2 Do I personally think, or do I
3 think it was a fair decision -- it was fair to
4 make that decision?

5 BY MR. KAPLAN:

6 Q. Do you think the term sheet -- putting
7 aside your decision-making process, and I'm
8 not questioning your decision-making, I'm
9 asking you sitting here today, is it your
10 testimony that you believe the term sheet and
11 the disparate treatment of creditors is fair?

12 MR. RAMOS: Objection, your
13 Honor; relevance. He's appearing on behalf of
14 the Debtors as their board member and to
15 discuss the decision he made in that capacity.
16 So his personal view --

17 THE COURT: He says in his
18 declaration it's fair. Overruled.

19 THE WITNESS: I said in my
20 declaration it's fair. It was -- yes, it was
21 fair.

22 BY MR. KAPLAN:

23 Q. So today it is your view that it is
24 fair?



1 A. It is fair.

2 Q. And why is it fair to have certain
3 creditors -- you're aware, for example, that
4 priority creditors don't receive any
5 distribution from the GUC trust, right?

6 A. I am aware of that.

7 Q. And you're aware that under the
8 Bankruptcy Code priority scheme, they're
9 called priority creditors because they're
10 supposed to be paid before general unsecured
11 creditors, right?

12 A. I am aware of that.

13 Q. And why is it fair to have a
14 settlement that provides -- that the priority
15 creditors don't receive any value?

16 A. It is -- they were assets of the
17 purchaser. The purchaser and the Committee
18 negotiated this term sheet and presented it to
19 us. Taken as a whole, I believe it was fair.
20 I had a decision to make, and my decision was
21 that the term sheet was fair, taken as a whole
22 to the overall company, the value of the
23 estate.

24 Q. Was it fair to those creditors, to the



1 priority creditors?

2 A. There's never -- when people --
3 there's not much of an answer to that. There
4 is -- there were all throughout the case and
5 my term at the companies, there were parties
6 exercising their contractual rights. They
7 made those determinations. I wish in many
8 cases those determinations were different.

9 Q. You haven't tried to negotiate the
10 terms of the term sheet since you received it
11 back on August 16th, right?

12 A. I have had discussions around changes
13 to -- I've had discussions around agreements
14 that were not in the term sheet that I would
15 have liked to have had in the term sheet, yes.
16 So I have -- I didn't pull the term sheet out,
17 send it to someone, and say let's negotiate
18 this paragraph. There were elements of the
19 term sheet, of the settlement, that I
20 preferred would have been different, and I on
21 several occasions had those discussions.

22 Q. You never had specific discussions,
23 for example, to have priority creditors
24 receive a distribution from the GUC trust,



1 right?

2 A. I did not have that discussion.

3 Q. And you never had specific discussions
4 about the deficiency claimants getting any
5 distribution from those aspects of the GUC
6 trust?

7 A. I did not.

8 MR. KINEL: Objection; it
9 assumes facts knots in evidence.

10 THE COURT: Which facts?

11 MR. KINEL: That deficiency
12 claimants are not receiving anything under the
13 term sheet. That's just factually incorrect.

14 MR. KAPLAN: I said under the
15 provisions of the term sheet under which they
16 do not receive a distribution.

17 THE COURT: The objection is
18 overruled.

19 BY MR. KAPLAN:

20 Q. Let's go back just to make sure that
21 we get the record complete with respect to the
22 term sheets. So we can go back to the binder
23 of the term sheets. Go to 24.

24 THE COURT: You can use our



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1 handy shelf there. Isn't that a nice shelf?

2 BY MR. KAPLAN:

3 Q. I apologize; I'll wait until you get
4 it in front of you.

5 A. So I'm at the witness binder, correct?

6 Q. Correct, and tab 24.

7 A. Yeah.

8 Q. Are you there, Mr. LaForge?

9 A. I'm there.

10 Q. It's an email forwarding from Nava
11 Hazan to Steve Leonard, and below is an email
12 from Joe Shifer to Nava, right?

13 A. Yeah.

14 Q. And this is also attaching a revised
15 term sheet red lined to the prior one, right?

16 A. Yes, it is.

17 Q. Okay. And now if you could turn to on
18 the black line, that's actually what we've
19 been focusing on, the claims and causes of
20 action?

21 A. The black line, page 2?

22 Q. Yeah, the black line, page 2.

23 A. I'm there.

24 Q. And you see now there's markup, it now



1 provides that the purchasers will cause the
2 APA to be amended, so rather than being
3 excluded assets, that upon the later date the
4 bankruptcy court enters an approval order on
5 the formation of the GUC trust, these assets
6 will be contributed to the GUC trust.

7 A. Yes.

8 Q. Did you authorize that change to the
9 term sheet?

10 A. I don't recall seeing an interim term
11 sheet, so I don't recall authorizing it, no.

12 Q. Did you recall any discussion about
13 the fact that this change was being made to
14 modify it from these assets being excluded
15 assets to now being assets that would be sold
16 to the purchaser?

17 A. There was -- I don't recall any
18 discussion on the mechanism of transferring
19 from the purchaser to the GUC trust, which
20 this is an element of. As I said, when I read
21 it the first time, given the timing, how they
22 got there was irrelevant to the decision that
23 we made at the time. So no, there was no
24 discussion about making this change.



1 Q. We talked a little bit about the
2 decision-making back on August 16th. Let's
3 fast forward to where we are today.

4 A. Okay.

5 Q. You testified earlier that the C Star
6 transaction closed at the end of November,
7 right?

8 A. I did, yes.

9 Q. And the Columbus sale closed, as well?

10 A. The Columbus sale was closed. I don't
11 remember the specific date, but yes, it closed
12 about the same time.

13 Q. And the DIP has long been approved in
14 this case, right?

15 A. The DIP has been assumed by the
16 purchasers.

17 Q. And you personally, I guess it's your
18 testimony in deposition was you're continuing
19 to support the settlement because you gave
20 your word you would support it, right?

21 A. That's correct.

22 Q. And what is the reason that the
23 Debtors are continuing to seek approval today,
24 besides your word? Is there any other reason?



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1 A. I think it's been covered, but not by
2 me, so I'll say it. When we negotiated the
3 APA, that is the point in time where we
4 crossed the bridge of letting these causes of
5 action leave the estate. And it was with
6 great reluctance that we agreed with that
7 provision of the APA. And I recall during
8 those discussions trying to change that all
9 along the way. Those assets were no longer
10 ours. Somebody had acquired them as part of
11 the APA. The ability to share those among
12 some of the creditors struck me as, continues
13 to strike me as maybe not as good as sharing
14 them with all the creditors, but better than
15 not sharing them at all.

16 Q. When you say that ship sailed, you
17 were unaware that the actual terms of the term
18 sheet contemplated modifying the APA so they
19 wouldn't be transferred, correct?

20 MR. RAMOS: Objection, your
21 Honor; misstates his prior testimony.

22 THE COURT: Overruled.

23 THE WITNESS: I've tried to
24 reply to that by telling you I did not believe



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1 that's what the term sheet said. The words
2 are what the words are. We, because of the
3 time that we had, much of the discussion on
4 what we were agreeing to was verbal, and I
5 believe that the terms were read into the
6 hearing that day, which probably didn't
7 address the mechanics, but certainly addressed
8 the concept that I had agreed to either in
9 RLF's offices or out in the hallway here that
10 the board had agreed to. And that was not
11 that we were getting the assets back. There
12 may have been a mechanism proposed in my mind
13 amended as proposed that there was a mapping,
14 but it was never my assumption that we would
15 get those assets without a quid pro quo that
16 they would be directed to the GUC trust.

17 Q. But it's different between getting the
18 asset back and directing them to the GUC trust
19 and never getting them back and having the
20 purchaser deal with it as they please, right?

21 A. I'm not sure of the distinction you're
22 trying to draw.

23 Q. Do you see a distinction between that?

24 A. Between?



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1 Q. The Debtor retaining certain causes of
2 action and contributing them to a trust versus
3 the purchaser buying them and contributing to
4 the trust.

5 A. If that were the case, I would see a
6 distinction, yes.

7 Q. If that were the case -- explain that;
8 I don't think I follow that. I apologize.

9 A. You created a hypothetical that in my
10 mind didn't exist at the time.

11 Q. Not with standing the words of the
12 term sheet?

13 A. Notwithstanding the words of the term
14 sheet.

15 Q. We talked a little bit earlier about
16 the time before the hearing. Do you recall
17 that prior to the August 16th hearing, the
18 Debtors had already agreed to adjourn the DIP
19 hearing?

20 A. Can you repeat the question?

21 Q. Yes. Do you recall that prior to the
22 morning of August 16th, the Debtors had
23 already agreed to adjourn the DIP hearing?

24 A. So I recall that now, after reading



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1 some documents preparing for this, I did
2 not -- I didn't, certainly didn't recall that
3 at deposition time.

4 Q. And you weren't expecting the sale to
5 close immediately upon approval of the sale
6 order, were you?

7 A. No.

8 Q. And in fact, it took several months
9 for it to close after the sale order, right?

10 A. It did.

11 Q. And would there have been any harm
12 during the sale hearing for a week while the
13 term sheet was finalized?

14 A. There was pressure all the time from
15 the three operating companies. They weren't
16 strong companies to begin with. Usually in
17 the food chain of making the product, they
18 were not the strongest provider, and so I
19 can't calibrate sitting here the effect of
20 being able to go to employees and customers
21 and say the sale has been approved I can't
22 recall what actions were taken upon the
23 approval, pardon me, the approval of the sale
24 and the closing of the transaction. But it's



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1 not like those were three months where
2 nothing, where no -- where we didn't utilize
3 the benefit of the information of the sale
4 being approved by the Court.

5 Q. But sitting here today, you can't say
6 one way or another whether adjourning the sale
7 by a week would have had any impact?

8 MR. RAMOS: Objection; calls for
9 speculation.

10 THE COURT: Overruled.

11 THE WITNESS: I can't say that.

12 BY MR. KAPLAN:

13 Q. And just to go back to a couple of
14 questions before, you said you sort of
15 refreshed your recollection that the DIP
16 hearing, that the DIP motion had been
17 adjourned prior to August 16th. On the
18 morning of the 16th when you approved the
19 settlement term sheet, were you aware that the
20 DIP hearing had already been adjourned?

21 A. I don't recall. I'm sorry.

22 MR. KAPLAN: One minute, your
23 Honor.

24 THE COURT: Mm-hmm.



1 MR. KAPLAN: I have nothing
2 further.

3 THE COURT: Okay. Any other
4 objectors wish to cross-examine the witness?
5 No? Yes. Okay. Before you do so, we're
6 going to take a short recess, then we'll have
7 your cross.

8 During our break, you may not
9 discuss your substance of your testimony with
10 any person. Okay?

11 THE WITNESS: Understood.

12 THE COURT: About five minutes.

13 (A brief recess was taken.)

14 CROSS-EXAMINATION

15 BY MR. RAISNER:

16 Q. Good morning, Mr. LaForge, Jack
17 Raisner, the Trevor Miller WARN class.

18 A. Good morning.

19 Q. Mr. LaForge, it's correct to say you
20 are familiar with the August 19, 2016 sale
21 order?

22 A. The sale of Columbus?

23 Q. Correct, the sale of Columbus.

24 A. Yes, I am.



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1 Q. And you're familiar with the provision
2 in that sale order which provides for
3 something called an employee funding escrow?

4 A. Yes, I am.

5 Q. Are you also familiar with something
6 called the CFC Employee Reserve?

7 A. I may be mixing those terms. I'm
8 familiar with an escrow of \$4.6 million. I
9 believe it may fall under the latter, not the
10 former.

11 Q. Is it correct to say or does this
12 refresh your recollection that after the
13 September 13th closing of the Columbus assets,
14 the escrow was renamed the CSC Employee
15 Reserve, that the two things are one in the
16 same, or is that not correct?

17 MR. RAMOS: Your Honor, if I
18 could just lodge a quick objection. I'm not
19 sure of the relevance of these questions. I
20 think the questions are arising under the
21 terms of the sale order, which is not at issue
22 today; we're here under the settlement term
23 sheet.

24 MR. RAISNER: Your Honor, the



1 question before there Court is a hearing on
2 the settlement, the global settlement of this
3 case leading to the dismissal of the case, and
4 what provisions have been made for creditors
5 in this case. And therefore, I'm asking
6 questions that are not precisely pertinent to
7 the declaration that Mr. LaForge provided in
8 his direct testimony, but he has knowledge as
9 a witness that is pertinent to the fairness
10 and the appropriateness of this entire
11 transaction.

12 THE COURT: Yeah, overruled. Do
13 you recall the question?

14 THE WITNESS: Well, I think the
15 question is about a change in names of an
16 escrow agreement. And in preparation for
17 this, in reviewing public documents, I didn't
18 review public documents. And I'm afraid I
19 can't answer the question of the name change.
20 I'm very familiar with an escrow of \$4.6
21 million, whatever its name may be, if that's
22 helpful.

23 BY MR. RAISNER:

24 Q. Is it your understanding that this



1 escrow of \$4.6 million is part of the Debtors'
2 estate, or is it your understanding it has
3 been alienated from the estate of the Debtors?

4 A. It never was the Debtors estate, to
5 the best of my knowledge. It is an escrow
6 provided by the purchasers or the noteholders,
7 it's an overlapping group, that the directors
8 insisted upon after the sale or during the
9 sale process to provide in the event that --
10 well, there are a couple of elements. To
11 provide certain claims that employees might
12 have with respect to severance and vacation,
13 of the Columbus entity only; and in the event
14 it was deemed that the company was responsible
15 for any WARN wages, that it would cover that,
16 too, and legal fees.

17 Q. Whose legal fees?

18 MR. RAMOS: Your Honor, if I may
19 renew an objection. I think counsel is
20 examining him without the benefit of putting
21 the documents before him, and so it's unfair
22 to the witness to ask for his recollection in
23 that way. And I'd simply note that we have
24 some sensitivity as we understand that these,



1 that there are ongoing issues with the WARN
2 claimants in the separate adversary
3 proceeding, so we're cautious in terms of the
4 scope of what counsel is inquiring into.

5 THE COURT: I think the witness
6 said he was familiar with the escrow and with
7 the APA, although he didn't review the
8 documents, so I think he can answer the
9 questions. Overruled.

10 BY MR. RAISNER:

11 Q. Mr. LaForge, I'm correct that your
12 testimony is that the escrow in question is
13 not part of the Debtors' estate. My question
14 to you, is there any provision that the
15 Debtors have made in its estate to pay for any
16 employee priority claims of any sort?

17 A. Of the Columbus estate?

18 Q. Yes.

19 A. Assuming that the priority claims
20 include severance and vacation, which I assume
21 is the case, we have made a provision. We
22 have negotiated as part of that sale agreement
23 that \$4.6 million would be escrowed that would
24 revert back to the folks that funded it in the



1 event that it was not used.

2 Q. But my question a moment ago was
3 whether it is your understanding that at
4 present, this escrow is part of the estate of
5 the Debtors or is alienated from the estate?
6 And I understood you to say that you thought
7 it had never been part of this estate, and now
8 you just said that the Debtors are relying on
9 this \$4.6 million to pay the claims of the
10 estate. And am I correct that without that
11 \$4.6 million from the escrow, the Debtors have
12 no capability or intention to pay any employee
13 priority claims?

14 MR. RAMOS: Objection; compound
15 and argumentative.

16 THE COURT: Overruled.

17 THE WITNESS: There are a few
18 questions in there; I'll do my best to sort
19 them out. Taking them in reverse order, from
20 a capacity standpoint, in the absence of the
21 escrow, there would be no ability, probably
22 no, I can't think of any, ability to pay
23 claims. That was the primary reason that we
24 negotiated that into the agreement.



1 Help me, what didn't I answer?
2 What's the second part?

3 THE COURT: I think that was the
4 question. I didn't hear more than one
5 question.

6 BY MR. RAISNER:

7 Q. Are you aware of any documentation
8 that exists that set terms for this escrow?

9 A. I don't believe there's an escrow
10 agreement, to the best of my knowledge. I
11 believe the only reference to it is in a
12 file -- a document that was filed with the
13 Court, and I can't remember which document it
14 was. But it does refer to it as an escrow. I
15 have since that date looked for an escrow
16 agreement and have been told there is not one.

17 Q. So there is nothing that describes
18 whether this escrow is revocable or not, is
19 there?

20 A. The only --

21 MR. RAMOS: Objection, your
22 Honor; calls for a legal conclusion.

23 THE COURT: Overruled.

24 THE WITNESS: The only



1 documentation is what appears in the documents
2 that were provided to the court. I would have
3 to -- I would have to read that again. I'm
4 sorry, but I would have to read that again to
5 know if there are any provisions.

6 BY MR. RAISNER:

7 Q. Is there any understanding as to
8 whether that escrow will survive if the
9 Debtors' estate is converted into a Chapter 7?

10 A. Is there any -- will it survive?

11 Q. Yes.

12 A. I don't know the answer to that.

13 Q. And do you know or have any
14 understanding as to whether the escrow would
15 survive if the Debtors' estate is dismissed?

16 A. I'm sorry, I don't know the answer to
17 that.

18 Q. The escrow as it's described in the
19 sale order and in the Debtors' dismissal
20 order, which is docket 685, refers to an
21 amount that the escrow would contain that
22 would satisfy what are called the estimated or
23 anticipated employee priority claims if they
24 are non-WARN claims, and would pay the



1 anticipated or estimated WARN claim. Are you
2 familiar with that language generally?

3 A. I'm familiar that that is the intent
4 that the directors had when they negotiated
5 that provision.

6 Q. Is there any provision that you're
7 aware of that purports that the employee
8 priority claims will be paid in full?

9 MR. RAMOS: Objection, your
10 Honor. The question is based on the dismissal
11 motion which is not before your Honor this
12 morning. And we renew the relevance motion.

13 THE COURT: Look, I know you and
14 Mr. Kinel have a very specific theme, which is
15 you want me to focus, laser focus on one
16 thing. I have to say I disagree. I think
17 it's a package deal. So I'm not going to not
18 have testimony that's focused on the dismissal
19 motion. I don't see how you can separate
20 them.

21 THE WITNESS: Can you repeat the
22 question, please?

23 BY MR. RAISNER:

24 Q. Sure.



1 A. Thanks.

2 Q. Are you aware of any document or do
3 you have any understanding whatsoever based on
4 anything that the Debtors and the noteholders
5 intend to use the escrow to pay the priority
6 claims in full?

7 A. The calculation that was done, there
8 was a calculation done by the CFO of Columbus
9 that came up with an amount. And the intent
10 of the amount was -- and it was to ensure that
11 if, in fact, some court or some other party
12 determined that there were amounts owed, that
13 there would be adequate funding to cover those
14 amounts. That included, remembering the
15 columns from that lengthy spreadsheet, which I
16 believe you have, was vacation pay, severance
17 pay, and potential WARN, in the WARN subject,
18 there's a WARN case going on at the moment.
19 And in the event that the company were deemed
20 by a court to be responsible for the WARN
21 wages, that the intent initially was to
22 calculate an adequate amount to cover that,
23 plus an amount for the taxes around that,
24 workers' comp, payroll taxes, and legal fees.



1 So the intent would have been,
2 would be to pay vacation, to pay severance,
3 and to see if the company is responsible under
4 WARN. As most people probably know, there's
5 two sides, two differing opinions on the
6 liability there, and that will be sorted out
7 in another venue, I suppose.

8 Now, the reason I went through
9 that is because if the question is is it fully
10 adequate, as I think you know and there have
11 been the issue raised with us, or your
12 partners have, that there are different
13 calculations when you go from Columbus court
14 to Delaware court with respect to how you
15 calculate some of those numbers. To the
16 extent that those, that post funding the
17 escrow those amounts have gone up, then there
18 would not be enough to cover all of those
19 claims in full. But that doesn't change the
20 vacation, severance, and the non-WARN priority
21 claims.

22 Q. So there is a reasonable scenario in
23 which the escrow at \$4.6 million would fall
24 short of what a court might award the



1 claimants in that fund; is that correct?

2 A. If -- I don't know about a reasonable
3 chance. I can imagine a scenario where that's
4 the case where it is fully determined without
5 any settlement that the company is responsible
6 for the full WARN wages as calculated subject
7 to the caps that exist, that given the fact
8 that it is moved from Columbus to Delaware or
9 that was just not factored in, if you will, at
10 the time of the calculation, that that would
11 not cover it. So that's correct.

12 Q. And in the event that the funds in the
13 escrow were insufficient to cover the
14 employees' priority claims, what would happen
15 then? Would the distribution then be at some
16 fraction of the full amount of those claims,
17 or would there be added funds to the escrow in
18 order to pay the claims in full?

19 A. At the moment, there have been no
20 discussions about adding funds. So it would
21 be, if we got there, we would have to answer
22 that question, but it's quite frankly hard to
23 know who would come up with that money and why
24 they would.



1 Q. And that would be up to whom to
2 determine whether funds should be added or
3 could be added?

4 A. Well, whoever the board at the time --
5 I say board, it's just me, right? So whoever
6 I would go to and ask if they would consider
7 topping that up.

8 Q. And you would go to the noteholders?

9 A. That would be the only relevant place
10 to go, although it's hard -- I'll just stop
11 there. I don't know what their reaction would
12 be. I suspect -- I don't know what their
13 reaction would be.

14 Q. But they would have veto power to not
15 fund the claims in full by topping up the
16 escrow?

17 A. Well, the -- I'm sorry to interrupt.

18 Q. That's okay.

19 A. It's not an agreement that they made
20 that they have a veto over, it's that there
21 was a calculation made, there was a deal cut
22 at the time to protect the employees. In the
23 event -- and it still would fully cover the
24 employees under the assumptions of the laws



1 that were deemed the calculations would be
2 made. Because, as you've pointed out to us,
3 that in the event that the company is, in
4 fact, responsible for those WARN wages, and
5 there are defenses that suggest it's not, but
6 if it is, and since we are in Delaware,
7 there's additional -- the calculation is
8 different. Same number of days, but business
9 days, work days, and it becomes more money and
10 there's inadequate funds.

11 Q. Mr. LaForge, I'd just like to return
12 to your itemization of what would be payable
13 out of the escrow, and you mentioned the
14 various types of claims, and you also
15 mentioned at the end attorneys' fees. So I
16 just wanted to ask you your understanding of
17 what the attorneys' fees payment would be.
18 Are you referring to the attorneys' fees that
19 might be part of a statutory remedy to the
20 claimant, or are you referring, as well or as
21 opposed to, the fees and expenses of the
22 defendant who is defending the claims against
23 the employee claims?

24 A. I think, you know, depending on what



1 the company chose to do, it will probably come
2 to court to, you know, to see. But this
3 was -- although for the reasons I mentioned
4 before, the numbers turn out to be somewhat
5 inadequate in Delaware calculation rather than
6 Ohio calculation where they are adequate, the
7 attorneys' fees were a bit of a sway. There's
8 a lengthy spreadsheet, as you know, a lengthy,
9 hard-to-follow spreadsheet.

10 But in fact, what the directors
11 were trying to protect themselves and to
12 ensure we could do is if the defenses that the
13 company has and believes are strong held up,
14 this went to court and held up in court --
15 pardon me, did not hold up in court, and the
16 full amount was, the full WARN wages were
17 granted to the employees, then we estimated
18 that what the legal expenses would be, and I
19 think that was without -- it was a very, it
20 was around -- it was \$500,000.

21 Q. Legal expenses of whom, Mr. LaForge?

22 A. I don't believe -- I would have to
23 look back to the document to see if it's
24 referred to exactly who that would be.



1 Q. So you're not sure if it refers to the
2 legal expenses of the plaintiffs' counsel or
3 the defendants' counsel?

4 A. Well, we were -- as directors, we were
5 interested in both. So I don't know that
6 there's any specific language that deals with
7 that. I think that would be a matter, if we
8 get to the point where the company believes it
9 needs to defend the claims in court, that we
10 would have to see, you know, we'd have to
11 figure out how to pay for that, and that's a
12 source of funding.

13 Q. Would it be consistent with your
14 understanding of this fee provision element
15 that the defending Debtor would be able to
16 have its attorneys have its fees paid and
17 expenses out of the fund, even without a court
18 order?

19 A. It is not my -- and I'd rather see the
20 document and understand what it says before I
21 comment on it, but I'll tell you my
22 understanding in the absence of that, which is
23 that there are multiple signatories to that
24 document. We would probably err on the side



1 of cautiousness and reach out to other
2 parties, whether it's the Court or not. But I
3 would certainly take advice from counsel as to
4 what would be the prudent way to deal with the
5 situation.

6 Q. Turn for a moment, Mr. LaForge, to the
7 non-WARN employee priority claims. Are you
8 familiar with a process whereby a notice would
9 be sent upon a dismissal to holders of the
10 non-WARN employee claims which they would be
11 informed that they were being allowed a
12 certain amount of money for one of their
13 claims?

14 A. Only in the most general terms from
15 reviewing a potential settlement agreement
16 with respect to this. Prior to that, I have
17 not participated in WARN claims before.

18 Q. So you have no personal understanding
19 of the terms of that sequence of events or the
20 procedures, other than what the documents
21 themselves say?

22 A. That is correct.

23 Q. Mr. LaForge, you're aware of the GUC
24 trust which is I think indisputably part of



1 today's agenda?

2 A. I am.

3 Q. And you're familiar with the terms of
4 the GUC trust in that it creates a body of
5 oversight, board members of whom a majority of
6 creditors, correct?

7 A. I am aware that there's a mechanism,
8 and that, whether it's been fully worked out
9 or not, I'm not sure. But yeah, there's
10 oversight.

11 Q. And there's a disinterested trustee
12 who is handling the administration of that
13 trust, the distributions, and all of the
14 operative functions of that trust; is that
15 more or less true?

16 MR. RAMOS: Your Honor, I don't
17 know if a document could be put in front of
18 the witness. I think he just testified he
19 wasn't familiar.

20 THE COURT: If you don't know
21 the answer, that's an adequate answer.

22 THE WITNESS: I don't believe I
23 know the answer to that.

24 BY MR. RAISNER:



1 Q. You're aware that a liquidating
2 trustee is contemplated to administer that
3 trust?

4 A. I'm aware of that.

5 Q. Was there ever any discussion of there
6 being a liquidating trustee of sorts or a set
7 of written procedures for the employees'
8 priority claims as there is for the GUC trust?

9 A. There was never a discussion, to the
10 best of my knowledge.

11 Q. Do you know why that was never
12 discussed?

13 A. I don't know why it was never
14 discussed.

15 Q. Do you know of any participation that
16 employees are contemplated as having in
17 administering or overseeing the employee
18 priority claims distribution mechanism?

19 A. I don't. I'm not aware of that. I
20 think there's a -- I won't draw the
21 distinction between the GUC trust, which was
22 negotiated by parties other than the directors
23 of the company, and the task undertaken by,
24 the negotiation undertaken by the directors of



1 the company and their professional advisors to
2 protect the employees in a sale that generated
3 cash. And with great confidence, I can say
4 that we've got somebody looking after, you
5 know, that can handle this. It's law, and the
6 law will be what it is as opposed to a highly
7 structured GUC trust that needs to be
8 administered.

9 Q. Who is the person who will be handling
10 this?

11 A. Well, there are calculations which
12 will be shared among the parties, have been
13 shared among the parties, the interested
14 parties, the professionals, and that will be
15 worked out. But on the Debtor side, I am the,
16 other than the assistance of the former CFO
17 who has access to the information, it is me.

18 MR. RAISNER: No further
19 questions.

20 THE COURT: Thank you.

21 MR. RAISNER: Thank you.

22 THE COURT: You're welcome.

23 MR. BENSON: Your Honor, for the
24 record, Ward Benson, Department of Justice tax



1 division here on behalf of the Internal
2 Revenue Service.

3 CROSS-EXAMINATION

4 BY MR. BENSON:

5 Q. Just a few questions, Mr. LaForge.

6 Are you aware that the Internal
7 Revenue Service has filed proofs of claim in
8 this case?

9 A. Has what? I'm sorry.

10 Q. Has filed proofs of claim in this
11 case? In these cases, I should say.

12 A. I'm sorry, I'm not familiar with the
13 term. I'm not familiar with the term.

14 Q. When you say term, proof of claim?

15 A. Proof of claim.

16 Q. Okay. Are you aware that the Internal
17 Revenue Service has asserted that it has
18 claims against the Debtors?

19 A. Oh, yes. Yes.

20 Q. Do you know what I mean by the phrase
21 priority claim?

22 A. I do, generally.

23 Q. What does that mean?

24 A. It means it comes ahead of other



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1 creditors. Priority claim comes ahead of
2 other creditors.

3 Q. Would a priority claim come ahead of
4 the beneficiaries of the GUC trust?

5 A. I'd have to remember who all the
6 beneficiaries -- it's just the unsecured
7 Creditors' Committee. If the company were
8 distributing money, that's correct, the
9 priority claims would come ahead of the
10 unsecured claims, non-priority claims.

11 Q. Okay. Do you have any reason to
12 believe that the asserted priority claims of
13 the Internal Revenue Service are not, in fact,
14 entitled to priority?

15 MR. RAMOS: Objection, your
16 Honor; calls for a legal conclusion. Not
17 relevant.

18 MR. BENSON: As to relevance, it
19 goes to the fairness of the settlement. It
20 also goes, the direction I'm going in, in
21 terms of bringing in priority creditors, which
22 the Jevic court said was very important.

23 As to legal conclusion, I'm not
24 asking him to determine whether they're



1 entitled to priority, I just want to know if
2 the Debtors have any reason to believe we're
3 not entitled to priority.

4 THE COURT: Overruled.

5 BY MR. BENSON:

6 Q. Do you have any reason to believe --

7 A. No. As a matter of fact, I assume
8 they are priority claims. I just didn't want
9 to make a -- draw a conclusion that I can't
10 back up with the law. But I'm assuming they
11 are priority claims.

12 Q. And are you aware that the priority
13 claims of the Internal Revenue Service are
14 approximately 2.4 million?

15 A. That sounds right, yes.

16 Q. Do you have any reason to believe that
17 the amount the IRS has asserted in claims is
18 incorrect?

19 A. I haven't looked at the numbers, but
20 it would not surprise me that that's the
21 correct amount.

22 Q. Okay. Now, at any point between the
23 initiation of the negotiation of the
24 settlement term sheet and the filing of the



1 objection by the Department of Justice to the
2 settlement, did you or any of the Debtors'
3 professionals reach out to the Internal
4 Revenue Service or the Department of Justice
5 to include them in negotiations?

6 A. I just want to make sure I -- did the
7 Debtors or any of their professionals reach
8 out to the participants to the, did you say
9 the UCC or the noteholders?

10 Q. Did you or the professionals reach out
11 to the Internal Revenue Service or the
12 Department of Justice?

13 A. Not to the best of my knowledge of my
14 knowledge.

15 Q. Did you ever ask the professionals
16 whether they should be reaching out to either
17 the Internal Revenue Service --

18 A. I did not.

19 Q. And as to the Department of Justice?
20 Did you ask them or ask whether you should be
21 reaching out to the Department of Justice?

22 MR. RAMOS: I apologize, your
23 Honor, could I just clarify the time period?
24 I'm afraid I didn't hear that part of the



1 question.

2 BY MR. BENSON:

3 Q. From when the negotiations of the term
4 sheet commenced, term sheet versions,
5 Mr. Kaplan asked you about, to the filing of
6 the objection by the United States to this
7 settlement motion.

8 A. And the question was did I think to
9 ask the professionals if they should?

10 Q. Yes.

11 A. I did not think to ask the
12 professionals if they should.

13 Q. Why not?

14 A. It comes back to the decision that we
15 were making on August the 16th, which was the
16 only situation where the settlement would be
17 relevant would be where the purchase was
18 approved, and the purchase approved all of the
19 assets would be owned by the purchaser. And
20 we could have reached out to the IRS, but we
21 didn't have anything to share with them,
22 unfortunately, and it was the purchaser who
23 decided to contribute those assets to the GUC
24 trust. So we wouldn't have reached out



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1 directly to the -- why it did not cross my
2 mind to reach out to the IRS.

3 Q. Did it occur to you you should reach
4 out just to let the IRS know that this type of
5 settlement was being contemplated?

6 A. Not to hide here, but I was a
7 director. Whether things get filed, we reach
8 out to professionals. We've been blessed to
9 have good advisors, and I rely on them to make
10 those kind of suggestions.

11 Q. Was there any discussion that perhaps
12 the sale hearing should be adjourned to allow
13 the inclusion of priority creditors such as
14 the Internal Revenue Service?

15 A. Sale hearing on the 16th of August?

16 Q. Correct.

17 A. There was no discussion of that.

18 Q. Is there any reason why the sale could
19 not have been postponed to include the
20 Internal Revenue Service as a negotiating
21 party?

22 A. The only answer, two answers to that,
23 first is the pressure was extraordinary at
24 these companies. I answered Mr. Kaplan



1 earlier in his follow-up questions, so those
2 will speak for themselves. To suggest that we
3 come out of a hearing with no decision and
4 that there would not have been damage caused
5 was not a risk we were prepared to take at
6 that moment. And risk -- these were fragile
7 companies that were relying on people paying
8 their bills, were relying on people to ship,
9 and fulfilling, more importantly, fulfilling
10 orders and keeping employees.

11 So that was the primary decision
12 for feeling a sense of urgency that morning in
13 spite of the fact pattern that's been
14 discussed.

15 Q. Okay. And so as a result of that
16 sense of urgency, it was deemed unnecessary to
17 bring in priority creditors to these
18 negotiations?

19 A. As I said in my deposition, while the
20 term sheet was new on the 16th to me and the
21 structure and the narrowness of it,
22 discussions of a settlement had been going on
23 in some form or another since prior to filing.
24 There were inner creditor matters that we



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1 tried to resolve at every step along the way.
2 There were -- I can't give you specific dates
3 in the context, but our professionals were
4 encouraging the parties to get together to
5 talk, to come up with what I would have termed
6 a global resolution. We had come to the
7 conclusion that that was probably not
8 happening since we were a couple of days
9 before the settlement, and -- pardon me, the
10 August 16th hearing, and we didn't have
11 anything.

12 So when the term sheet was
13 handed to us, it was the transaction that
14 appears in the settlement term sheet, which
15 was the purchasers and the Unsecured
16 Creditors' Committee coming up with that
17 arrangement, and the Creditors' Committee
18 would drop their oppositions. It wasn't
19 that -- we weren't doing something, we weren't
20 distributing some of our assets. We didn't
21 feel like we had anything to bring people in.
22 We had made the case for months that we would
23 prefer a settlement that would resolve these
24 cases and end litigation, and this one has



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1 seemed to, you know, keep it going for some
2 obvious, you know, legal reasons outside of
3 this case. But nonetheless. Our -- we were
4 not giving anything -- we were not giving
5 anything we had to anyone at the time.

6 Q. You mentioned that there were
7 negotiations, including between creditors
8 starting before the petition date through the
9 sale hearing, and there was a hope that there
10 would be a global settlement. Did those
11 parties ever include the Internal Revenue
12 Service?

13 A. When you say include, did they talk
14 to -- if the question is did they actually
15 reach out and talk to them, as I mentioned in
16 the deposition, if we go pre-filing, there was
17 a settlement with the IRS. The IRS claim, I
18 believe, is primarily from one company,
19 Columbus Metal Forming, and the claim was
20 larger. And there was a settlement reached
21 with the IRS where payments were made, monthly
22 payments were made to the IRS to whittle down,
23 if you will, that obligation. Prior to fully
24 whittling it down, there was a filing.



1 So again, the timing matters
2 here. To the best of my knowledge post
3 filing, I don't know of any conversations
4 directly with the IRS by any of the parties.
5 I'm just not aware.

6 MR. BENSON: All right, that's
7 all, your Honor.

8 THE COURT: Thank you,
9 Mr. Benson. Any further questions? Any
10 redirect?

11 MR. RAMOS: Two very quick ones,
12 your Honor.

13 REDIRECT EXAMINATION

14 BY MR. RAMOS:

15 Q. Mr. LaForge, you were asked during the
16 cross-examination whether after the August
17 16th date, after that term sheet that was
18 being looked at with counsel for the DDTL
19 parties, did you try to negotiate for the
20 assets to come back into the estate, and I
21 believe your answer was no. But my question
22 to you is prior to that time period, from the
23 outset of these cases, had you tried to have
24 claims and causes of action kept in the estate



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1 that otherwise were going under the proposed
2 purchase agreements?

3 A. I -- yes. The answer is yes. And it
4 was one of the more important matters for me,
5 because to the extent that damage had been
6 caused, and there were causes of actions that
7 would with Stan, you know, the scrutiny of
8 people who determined that, those struck me as
9 better belonging to the estate than to the
10 purchasers. There were, I think it's been
11 documented here there was a term sheet about
12 mid May from the purchasers that included all
13 the causes of actions, and then there was an
14 APA in late May from the same people with the
15 same causes of actions. We had, I believe,
16 filed with the Court an APA after that date
17 keeping the causes of action.

18 It was very important to me
19 personally, and I know the directors as a
20 whole, to maintain those. And in the
21 negotiation of the sale and the results of the
22 sale auctions, that's where we ended up,
23 disappointingly.

24 Q. So in the context of the sales, then,



1 the Debtors were not successful in terms of
2 those discussions to try to retain claims and
3 causes of action?

4 A. We were not successful.

5 Q. Sir, I think you testified, there was
6 discussion during your examination about the
7 August 16th hearing and the DIP motion and the
8 timing issues related to that. But my
9 question is do you have any recollection as to
10 whether the Committee's objections to the DIP,
11 were they actually withdrawn?

12 A. They were -- to the best of my
13 recollection, they were withdrawn. That was
14 important, there's a timing difference there
15 that was pointed out to me, but, yeah, they
16 were withdrawn.

17 MR. RAMOS: No further
18 questions, your Honor.

19 THE COURT: Thank you, sir; you
20 may step down.

21 THE WITNESS: May I leave the
22 books?

23 THE COURT: Yes, please.

24 MR. RAMOS: Just one



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1 housekeeping matter, then, your Honor. From
2 the Debtors' perspective, we would move the
3 introduction of the exhibits in the binders,
4 which I understand there was no objection to
5 by the various parties. That would be Debtors
6 1 through 17, and your Honor, just so you
7 know, we handed copies to you; we're obviously
8 retaining the originals of the exhibits being
9 offered into evidence.

10 THE COURT: Right. Any
11 objection to the admission of Debtor 1 through
12 17?

13 MR. KAPLAN: No objection, your
14 Honor.

15 THE COURT: They're admitted.

16 MR. RAMOS: Thank you, your
17 Honor.

18 THE COURT: You're welcome.
19 Next witness? Let's at least get started on
20 the next witness before we break for lunch.

21 MR. KINEL: Your Honor, the
22 Committee calls Steven Sass.

23 THE COURT: All right, Mr. Sass,
24 please take the stand and remain standing,



1 please.

2 STEVEN D. SASS, after
3 having been first duly sworn, was
4 examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. KINEL:

7 Q. Good afternoon, Mr. Sass.

8 A. Good afternoon.

9 Q. Could you briefly describe your
10 educational background?

11 A. Sure. In addition to an undergraduate
12 degree, I have an MBA in management, I have a
13 law degree and am admitted as an attorney in
14 Maryland, state and federal, and I'm qualified
15 for CPA certification.

16 Q. Are you in good standing in the bar?

17 A. I'm sorry? Yes, I'm in good standing.

18 Q. And do you practice law currently?

19 A. I do at times, yes.

20 Q. Can you tell us what your role is in
21 the Constellation cases?

22 A. Sure. In the Constellation case, I
23 participate as a member of the Creditors
24 Committee on behalf of Praxair, one of the



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1 large creditors.

2 Q. And how big is the Committee?

3 A. The Committee has seven members.

4 Q. And you are Praxair's representative
5 on the Committee?

6 A. That's correct.

7 Q. Do you participate in Committee
8 meetings and calls?

9 A. Yes. It's very important to me and
10 it's important to the process, so yes, I do?

11 Q. Would you say that you've participated
12 in nearly all of the Committee meetings and
13 calls?

14 A. Yes, I would say if not all, very
15 close to all.

16 Q. Okay. Have you ever been on a
17 Creditors' Committee before?

18 A. I've been on approaching 100 Creditors
19 Committees over the last 20-some-odd,
20 30-some-odd years. Thirty-ish.

21 Q. So you have a lot of experience in
22 Committee matters?

23 A. Yes.

24 Q. Would you consider the Creditors'



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1 Committee in these cases to have been active?

2 A. This particular Committee was very
3 active, much more so than average.

4 Q. Did there come a time when the
5 Committee, you as a Committee member, became
6 aware of settlement negotiations that were
7 occurring between the Committee on behalf of
8 the Committee and the noteholders?

9 A. Yes, settlement negotiations -- well,
10 this case moved very fast in the beginning and
11 then went into a hiatus more recently through
12 a bunch of extraneous reasons. So yes, I was
13 aware of negotiations ongoing.

14 Q. And was the Committee kept apprised of
15 the developments in those negotiations?

16 A. Yeah, in my opinion, Committee
17 professionals did a very good job keeping the
18 Committee apprised of the ebb and flow and
19 development of the negotiations, both
20 through -- mostly through conference calls,
21 but through a few emails, as well.

22 MR. KINEL: Your Honor, may I
23 approach?

24 THE COURT: Mm-hmm.



1 MR. KINEL: I apologize, we're
2 doing this out of order. But I've handed the
3 witness what has been marked as Committee 3,
4 which is simply the settlement term sheet,
5 which I believe is already in the Debtors'
6 binder, but not to make people look through
7 binders.

8 BY MR. KINEL:

9 Q. Mr. Sass, I direct your attention to
10 Committee 3. Do you recognize that document?

11 A. Yes, I do.

12 Q. Was this document approved by the
13 Creditors' Committee?

14 A. Yes, it was. It was brought to the
15 Committee's attention and approved through a
16 Committee meeting, telephonically, I believe.

17 Q. Was there a discussion about the terms
18 of this settlement?

19 A. As was all of the calls that we had
20 about the ebb and flow of the negotiations,
21 there was extensive discussion, questions
22 raised and answered, so yes, there was a lot
23 of discussion.

24 Q. Mr. Sass, do you believe the



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1 settlement embodied in Committee 3 is fair?

2 A. Is it fair? Yes, I believe it's fair.

3 Q. Do you believe it's a reasonable
4 settlement?

5 A. Given the circumstances in which the
6 creditor body found itself, it's a more than
7 reasonable settlement to the general unsecured
8 creditors.

9 Q. To your knowledge, was it negotiated
10 at arm's length?

11 A. I'm sorry, say that again?

12 Q. To your knowledge, was the Committee
13 settlement negotiated arm's length?

14 A. Yes, absolutely.

15 MR. KAPLAN: Objection, your
16 Honor. There's been no foundation whatsoever
17 about any firsthand knowledge. All the
18 testimony so far was he learned everything
19 through counsel.

20 THE COURT: Overruled.

21 MR. KINEL: I asked to his
22 knowledge.

23 THE COURT: Overruled.

24 MR. KINEL: Thank you. You can



1 answer.

2 THE WITNESS: I'm sorry, what
3 was the question again?

4 MR. KINEL:

5 Q. To your knowledge, was the settlement
6 negotiated at arm's length between the
7 parties?

8 A. Oh, yes, it was.

9 MR. KINEL: May I approach once
10 again?

11 THE COURT: Mm-hmm.

12 BY MR. KINEL:

13 Q. Mr. Sass, I've handed you what's been
14 marked as Committee Exhibit 1. Do you
15 recognize that document?

16 A. Yes, I do.

17 Q. What is that?

18 A. This is the liquidating trust
19 agreement presented here as an exhibit to one
20 of the other documents.

21 Q. Okay. Have you had a prior
22 opportunity to review this document?

23 A. Yes, I did, more than once.

24 Q. Do you believe that the terms of the



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1 liquidating trust agreement are fair and
2 reasonable under the circumstances?

3 A. I do. For the most part, they are not
4 unusual as to liquidating trust agreements
5 I've seen before.

6 Q. I direct your attention to Committee
7 Exhibit 2. Could you identify that document?

8 A. Yes. That is the, as it's called, the
9 binding claims mediation agreement.

10 Q. I'm sorry, could you --

11 A. Yes, I do recognize it.

12 Q. What's the title of that document, for
13 the record?

14 A. Liquidated trust binding claims
15 mediation agreement.

16 Q. Have you seen that document before?

17 A. I have.

18 Q. You've had a chance to review it
19 before?

20 A. I have.

21 Q. Do you believe that the terms of the
22 proposed mediation procedures are fair and
23 appropriate under the circumstances of these
24 cases?



1 A. Yes, I believe they are fair and
2 appropriate and created for the situation we
3 find ourselves in.

4 Q. Why is that?

5 A. Well, we've got a situation right now
6 where, as I understand it, the claims are
7 unknown, so the GUC trust that's created in
8 the case is kind of going into an unknown
9 situation which normally would create a lot of
10 work for the Court and for the trust. And
11 this mediation structure seems to be a much
12 more efficient way of dealing with it and
13 saving the Court and the trust money and time.

14 Q. Mr. Sass, you said you served on
15 approximately 100 creditors' committees. Do
16 you believe the creditors' committees in these
17 cases have exercised their fiduciary duties?

18 A. Absolutely.

19 MR. KINEL: Thank you; no
20 further questions.

21 THE COURT: Cross?

22 MR. KAPLAN: Should I continue?

23 THE COURT: Yes.

24 CROSS-EXAMINATION



1 BY MR. KAPLAN:

2 Q. Good afternoon, Mr. Sass. Gary Kaplan
3 from Fried Frank on behalf of the DDTL
4 parties. I believe you have a witness binder
5 still up there; we're going to go through that
6 in a few minutes. I just want to make sure
7 it's still up there in front of you.

8 Just to go back to --

9 THE COURT: You want to help him
10 out? I don't think he knows which one.

11 THE WITNESS: I don't know which
12 one. Which one are we talking about?

13 BY MR. KAPLAN:

14 Q. You had no involvement in the
15 negotiation of the settlement, correct?

16 A. I was not on hand at the negotiation,
17 that's correct.

18 Q. You didn't witness a single
19 conversation between any representative of the
20 Committee and the noteholders in negotiating
21 the settlement, correct?

22 A. That's correct.

23 Q. All of those negotiations were handled
24 by counsel and the financial advisors,



1 correct?

2 A. That's correct.

3 Q. And in fact, in your deposition, you
4 testified there would be nobody on the
5 Committee who would have firsthand knowledge
6 of the negotiations between the Committee and
7 the purchaser on the terms of the agreement,
8 right?

9 A. I think I said I wasn't aware of
10 anybody. If I wasn't clear enough, I wasn't
11 aware of anybody.

12 Q. Now, your counsel you asked you some
13 questions about your fiduciary duties. Do you
14 recall those?

15 A. Yes, sir.

16 Q. And you testified that you think the
17 settlement is consistent with your fiduciary
18 duties to unsecured creditors, correct?

19 A. That's correct.

20 Q. And as a member of the Committee, your
21 fiduciary duties run through all unsecured
22 creditors, correct?

23 A. The general unsecured creditors, yes.

24 Q. When you say general unsecured, is



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1 there a category of unsecured creditors that
2 are excluded from your fiduciary duties?

3 A. Is there a category excluded from
4 general unsecured? No, not that I'm aware of.

5 Q. So your fiduciary duties run to
6 priority creditors, right?

7 A. Priority are not unsecured, they're
8 priority.

9 Q. So you don't have duties to priority
10 creditors?

11 A. I don't believe so.

12 Q. How about creditors to the extent they
13 have a -- secured creditors to the extent they
14 have a deficiency claim, do you have a duty to
15 those creditors?

16 A. Secured creditors as to their secured
17 interest, we would not. As to an unsecured
18 deficiency, we would be at times looking after
19 them, as well.

20 Q. At times, you said. When would you
21 not be looking after those deficiency claims?

22 A. It depends in how they got to where we
23 are at that point in time. General unsecured,
24 unsecured creditors for the most part, those



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1 that serve on committees tend to be think
2 trade employees and related. Other groups
3 that tend to be priority may not be in that
4 category and come in with a different
5 perspective and different ability to represent
6 themselves. May not need our help as much.

7 Q. So is it your testimony that your
8 fiduciary duty is to those who serve on the
9 Committee as opposed to those who hold
10 unsecured claims?

11 A. No, no. It's very clear, it's to all
12 of the creditors that hold claims,
13 specifically not to our own companies or just
14 those on the Committee, but to all creditors.

15 Q. And that would include secured
16 creditors to the extent they have an unsecured
17 deficiency claim?

18 A. Yes, it would.

19 Q. Are there any exceptions that you're
20 aware of to that?

21 A. Exceptions? No, not normally.

22 Q. Let's go to the binder, if you will,
23 and start on tab 17. Let me know when you're
24 there.



1 A. I'm at tab 17.

2 Q. And the first page of it is an email
3 from a lawyer at Akin Gump to Committee
4 counsel, right?

5 A. It appears to be, yes.

6 Q. And the email says that it attaches a
7 term sheet for global resolution and asks that
8 it be shared with the Committee?

9 A. Yes.

10 Q. Do you recall this term sheet being
11 shared with the Committee?

12 A. It probably was. I believe so. But
13 there were a lot of term sheets that went back
14 and forth. Most of them were shared with us,
15 and mostly tracked to the one that came out at
16 the end of the day that's now in the documents
17 before the Court. So probably yes, but I
18 don't recall this specific one.

19 Q. If you could turn to page 2 of the
20 term sheet.

21 A. Mm-hmm.

22 Q. And you see there's a paragraph close
23 to the bottom that talks about, that says the
24 beneficiaries of the litigation trust. Do you



1 see it starts there, and it's highlighted on
2 the screen if that's easier.

3 A. Yes, I see that.

4 Q. So the term sheet proposed by the
5 noteholders proposed a litigation trust, and
6 goes on to say it shall be all of the Debtors'
7 general unsecured creditors, including
8 noteholders to the extent of any deficiency
9 claim, right?

10 A. Yes, it says that.

11 Q. So this proposal didn't carve out any
12 specific unsecured creditors, it said all
13 would receive the benefit of the liquidation
14 trust, right?

15 A. Not as far as the paragraphs we looked
16 at, so I don't see it, where they carve
17 anything out.

18 Q. And then if you go down to the bottom
19 of the next paragraph on that page, the bottom
20 of page 2, you see it talks about specified
21 causes of action?

22 A. Yes.

23 Q. And you see it says the proceeds
24 recovered from the proceed of any specified



1 causes of action will be allocated on a
2 ratable basis among the holders of general
3 unsecured claims. Do you see that?

4 A. Yes.

5 Q. So the noteholders' proposal that was
6 sent to the Committee in mid July proposed
7 that the allocation of what was being put into
8 trust, if you will, would go to all unsecured
9 creditors, right?

10 A. That's what this one appears to do,
11 yes.

12 Q. And after receiving that term sheet,
13 do you recall the Committee discussing that it
14 shouldn't be allocated, that proceeds to the
15 unsecured should not be allocated ratably, and
16 instead should only go to certain creditors?

17 A. No, I don't recall a discussion of
18 that nature.

19 Q. Let's turn to tab 18, if you would.

20 A. Yes, I'm there.

21 Q. And tab 18, we've already established,
22 this term sheet is on August 10th, and this
23 goes from Nava Hazan, who is Committee
24 counsel, to the noteholders' counsel,



1 Mr. Rubin and Mr. Alberino, right?

2 A. Yes.

3 Q. And it attaches a revised version of a
4 term sheet, right?

5 A. There is a version of the term sheet
6 there, yes.

7 Q. Okay. And let's turn to page 3, if we
8 will.

9 A. Of the term sheet? Yes.

10 Q. And in the middle, there's a paragraph
11 that starts the exclusive beneficiaries of the
12 GUC trust.

13 A. I see that.

14 Q. And this term sheet provided, and you
15 can read the language, provided that the
16 beneficiaries of the GUC trust would be
17 holders of allowed general unsecured claims,
18 and the only carve out was the deficiency
19 claims of the holders of the notes, of the
20 purchasers with whom you're negotiating,
21 right?

22 A. That's what that paragraph says, yes.

23 Q. And then you see the next paragraph
24 talks about, again, the specified causes of



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1 action, and there, too, it says the proceeds
2 recovered from the pursuit of any specified
3 causes of action will be allocated on a
4 ratable basis among the GUC trust
5 beneficiaries, right?

6 A. Yes.

7 Q. So here, too, there was no carve outs
8 for deficiency claims or priority claims, that
9 they wouldn't be beneficiaries of the
10 distributions, right?

11 A. I don't see language that does that;
12 that's correct.

13 Q. Let's see if we can turn to tab 19.
14 And this one, the cover page, it's an email
15 from Committee counsel back to the counsel to
16 the noteholders or purchasers that says
17 attached please find a revised draft of the
18 term sheet. Do you see that?

19 A. I see that, yes.

20 Q. And if we could turn to, the black
21 line would be easier, turn to page 3, if you
22 will.

23 A. Is this the black line attached?

24 Q. Yeah, the black line should be



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1 attached.

2 A. I'm on page 3.

3 Q. You see there's a paragraph in the
4 middle that says the holders of general
5 allowed unsecured claims --

6 A. Actually, my page 3 is not the black
7 line.

8 Q. They're repaginated, so if you go past
9 the claims, you'll see the black lines after
10 that, and the page numbers start again.

11 A. There it is; thank you. I'm sorry,
12 you were saying?

13 Q. And you see there's language in the
14 middle of the page that says the holders of
15 allowed general unsecured, and new language
16 now, non-priority claims against the Debtors,
17 excluding deficiency claims of pre-petitioned
18 secured creditors. Do you see that that's
19 been added?

20 A. I do see that addition.

21 Q. Do you recall the Committee directing
22 its counsel to change the term sheet so as to
23 exclude certain creditors from participating
24 in the GUC recovery?



1 A. No, I do not recall us directing them
2 to do that.

3 Q. Do you recall discussion amongst the
4 Committee about changing the term sheet so
5 that holders of priority claims and deficiency
6 claims would no longer receive a distribution
7 under the -- from the GUC recovery?

8 A. As I think I mentioned, there were
9 numerous versions of the settlement term
10 sheet. We discussed many of them. I can't
11 even say that we discussed all of them. There
12 were probably some we didn't see where the
13 change was very minor. I don't recall this
14 particular change coming in at a particular
15 point in time, but it did come in. I can't
16 tell you why it came in at that point in time.

17 Q. But you can't tell us why this change
18 was made, right?

19 A. That's correct.

20 Q. You certainly can't say it was because
21 the noteholders were insisting on it, right?

22 A. I can't say that. I have no
23 knowledge.

24 Q. Let's move on. Now, you've testified



1 earlier that you thought that the settlement
2 was fair and reasonable to all unsecured
3 creditors, right?

4 A. Yes, I did.

5 Q. And you understand, obviously, based
6 on your experience, that priority creditors
7 ordinarily would receive a distribution ahead
8 of other unsecured creditors, right?

9 A. Often, that's correct.

10 Q. When you say often, is there -- other
11 than when priority creditors agree to not come
12 first, you understand that under the
13 Bankruptcy Code, priority creditors are
14 supposed to be paid before general unsecured
15 creditors are paid?

16 A. When the Debtor is making payments,
17 yes, that's correct.

18 Q. Okay. But as we've seen here, the
19 term sheet no longer provides for priority
20 creditors to be paid ahead let alone receive
21 any recovery from the GUC trust, right?

22 A. Well, the discussion here, unless I
23 missed something, was mostly about their
24 deficiency portion. I didn't see a lot of



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1 discussion about the priority payments.

2 Q. Well, let's go back. The language is
3 on the screen if it's easier, but obviously if
4 you need to refer to the whole document, you
5 should. But you see the first addition is to
6 add the word non-priority, right?

7 A. Right.

8 Q. So that would carve out priority
9 claims?

10 A. Right. It's not addressing what
11 happens with priority, correct. It's saying
12 what isn't happening with the priority.

13 Q. But under this, based on this
14 language, because it says the holders of
15 allowed general unsecured non-priority claims
16 against the Debtors excluding deficiency
17 claims, will be the sole and exclusive
18 beneficiaries of the GUC trust, correct?

19 A. It does say that, yes.

20 Q. So we both agree that priority
21 claimants will not be a beneficiary of the GUC
22 trust, correct?

23 A. Under this language, that's correct.

24 Q. Why is that fair to holders of



1 priority claimants?

2 A. The holders -- there's a lot of
3 reasons that the holders of the priority
4 claims are more favorably situated in the
5 entire process than the general unsecured
6 creditors. Well, first of all, by nature of
7 priority claim, they're going to get payments
8 first for the priority portion. Typically,
9 and as was the case here, many of them had
10 their own counsel and were very vocal and
11 visible in the process as compared to the
12 general unsecured creditors, which tend not to
13 be and need the support and protection of the
14 general unsecured creditor committee, Official
15 Committee of Unsecured Creditors.

16 So it's not unusual in my
17 experience for priority claimants to end up
18 with a lesser than standard distribution in a
19 case through a plan or other vehicles.

20 Q. When they don't agree to it?

21 A. Most often they agree to it, but not
22 always.

23 Q. Which circumstances are you aware of
24 where priority claimants haven't agreed to it



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1 and in a plan or otherwise, they've been
2 forced to --

3 A. It's not the Debtors' money when it's
4 coming from a third party, often a third party
5 can have a very strong influence, I won't say
6 dictate, but can have a very strong influence
7 on the structure of where the money goes, what
8 happens to it, and who gets it. And I've seen
9 that before on occasion.

10 Q. How many cases have you've been
11 involved with have you seen that?

12 A. Not a lot. Of the approaching 100
13 committees I've been on, probably single
14 digits.

15 Q. But let's go back to the situation in
16 front of us that you testified previously was
17 fair, okay?

18 A. Yes.

19 Q. My question was is the treatment being
20 afforded to the priority claims fair under
21 this settlement?

22 A. Yes, I think it is for a number of
23 reasons. As I said before, they are getting
24 distribution of the priority portion. Without



1 this settlement structure coming forth, the
2 unsecured creditors would be getting nothing.
3 So is there a trade-off happening that is less
4 than optimum? Sure. But that happens
5 sometimes, and in order to get something for
6 the creditors, that was a structure that had
7 to happen.

8 Q. Explain to me what you mean, if you
9 would, they're getting paid on their priority
10 portion?

11 A. If they have a priority claim.
12 They're not getting paid by us, but pursuant
13 to any other money in the estate or any other
14 vehicle for payment, they would be getting
15 paid before us.

16 Q. And it's your understanding there's
17 other money in the estate to pay other
18 priority claims?

19 A. I don't know that.

20 Q. You're on the Committee, right?

21 A. Yes.

22 Q. And you're an active member of the
23 Committee, right?

24 A. Yes.



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1 Q. And you understand the Debtors'
2 current financial circumstances, right?

3 A. That's correct.

4 Q. And you understand that the Debtors,
5 for example, haven't been paying Committee
6 counsel for some time, right?

7 A. That's my understanding.

8 Q. So are you aware of any source of
9 funds that the Debtors have to pay any of the
10 priority claims aside from the WARN act
11 claimants?

12 A. I am not.

13 Q. And under the terms of this
14 settlement, there's no money allocated to pay
15 the priority creditors, right?

16 A. That's correct.

17 Q. So go back to my question, then. If
18 we've established there's no money to pay the
19 priority claimants, putting aside the WARN
20 claimants, we've established there's no money
21 in the Debtors' estate to pay the priority
22 claimants, they're going to receive nothing
23 under this settlement, how is this settlement
24 fair to priority claimants?



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1 MR. KINEL: Objection, your
2 Honor. It assumes facts not in evidence. We
3 haven't established that there's no money in
4 the estate. Mr. Sass testified he's not aware
5 of any method of payment from the estate.
6 That's not dispositive of the issue.

7 THE COURT: Mr. Ramos, how much
8 money is in the estate?

9 MR. RAMOS: Your Honor, I can't
10 answer that question just standing here today.
11 Obviously, in addition to whatever funds there
12 might be, there are claims and causes of
13 action in the estate that have some value, and
14 those have quantified.

15 MR. KAPLAN: Your Honor, the
16 Debtors have put on the record repeatedly,
17 including in refusing to set a bar date, that
18 these estates are administratively insolvent.
19 And again, we've had the fight about a bar
20 date and the Debtors' refusal to do it. It is
21 clear, we can pull out their pleadings and
22 admissions, but to have this debate right now
23 about whether the Debtors have funds or don't
24 have funds is a little bit silly.



1 MR. RAMOS: Your Honor, I
2 frankly wasn't trying to be part of a debate,
3 I was trying to ask the question that the
4 Court posed. Certainly, as counsel indicated,
5 the Debtors have made filings including with
6 regard to the bar date issue and talk about
7 the exigent circumstances from a financial
8 perspective of the estates.

9 THE COURT: I'll allow it,
10 overrule the objection. I think that, you
11 know, it actually boggles my imagination why
12 we would even be having this debate if there
13 was -- well, maybe with you, Mr. Kaplan, but
14 why we'd be having this debate if there was
15 sufficient money to pay unsecured creditors.

16 So I'm not going to close my
17 eyes to the reality of this case. You know,
18 if I'm wrong, if this case is fully
19 administratively solvent and there's enough
20 money to pay priority unsecured claimants in
21 full, that still doesn't solve Mr. Kaplan's
22 problem. But I'd be shocked.

23 So I think, you know, based on
24 my experience with the case, to sort of get up



1 here and imply there's no evidence that
2 there's insufficient money to pay priority
3 unsecured claimants I think is unrealistic.
4 So I'll allow the question. Do you want to
5 restate it?

6 BY MR. KAPLAN:

7 Q. So Mr. Sass, having established that
8 the priority creditors will receive nothing
9 under the terms of this settlement, and that
10 there's no money in the estate to pay priority
11 creditors, how is this settlement fair to
12 priority creditors?

13 A. There's no money in the estate to pay
14 the priority creditors except for the ones
15 that are getting paid that you mentioned, so
16 we have a structure that even treats priority
17 claimants differently. We had a situation
18 here where we could try to get some money for
19 the creditors through someone willing to put
20 some into a put through a trust, and it was
21 the best deal that could be negotiated. It
22 still seems fair.

23 Q. You previously testified that you have
24 no idea who insisted on this language and how



1 this language got in here, right?

2 A. That's correct.

3 Q. So you can't sit here and testify that
4 that's the best deal you could have gotten,
5 right?

6 A. I can, because I trust my
7 professionals. They seem to have been doing a
8 good job. I've seen professionals -- this was
9 a difficult negotiation from what I could see
10 from a distance, but yet it kept moving and
11 kept move ing in a direction that had the
12 result of turning up some money for my
13 constituency. That's fair. That's a good
14 result. They worked hard.

15 Q. But we established your constituency
16 includes, for example, the holders of
17 deficiency claims, right?

18 A. Normally who would be included.

19 Q. Do you think they did their best job
20 to get a recovery for the holders of
21 deficiency claims?

22 A. Yes.

23 Q. Then let's look back at this
24 paragraph. Do you see the language that was



1 added by Committee counsel excluding holders
2 of deficiency claims from the GUC recovery
3 trust?

4 A. I don't know it was added by Committee
5 counsel, but it is in this version, yes.

6 Q. And we established at the beginning
7 that this was a term sheet that was sent with
8 changes sent by Committee counsel, right?

9 A. Right, subject to I think a discussion
10 they had previously, so I don't know -- I
11 mean, they did the crafting of the words and
12 sent it around, but I don't know who put the
13 concept in.

14 Q. You are aware that the current version
15 of the term sheet contemplates that certain
16 claims and causes of action will be purchased
17 by the or were purchased by the purchaser then
18 contributed to the GUC trust, right?

19 A. Yes, I'm aware of that.

20 Q. And you're also aware that that
21 provision changed over time, right?

22 A. Yes.

23 Q. And that that provision originally
24 provided that those claims and causes of



1 action would be excluded assets and thus left
2 behind for the Debtor to contribute to the
3 trust, right?

4 A. I'm gathering that from the flow of
5 documents. I didn't really recall it
6 otherwise, but yes, that makes sense.

7 Q. But you don't recall that, right?

8 A. No.

9 Q. And you don't know why that changed?

10 A. I do not.

11 Q. And you certainly are not testifying
12 it was insisted by the purchaser or any other
13 party, right?

14 A. I generally cannot ascribe any
15 particular change to any particular party. I
16 wasn't there for the discussion.

17 Q. Any particular changes that you can
18 ascribe to the Committee having demanded?

19 A. Not specifically, no.

20 Q. Okay. Sitting here today, what
21 benefits are there to the Debtors of pursuing
22 this approval of the settlement?

23 A. I'm sorry, say again, please?

24 Q. Sitting here today, what benefits, if



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1 any, do the Debtors receive from approval of
2 the settlement?

3 A. It moves them towards completion of
4 the case.

5 Q. And how does it move them towards
6 completion?

7 A. Well, we get a trust created to pay
8 creditors, and I presume there's a settlement,
9 that the settlement is approved, and they get
10 an opportunity to be left with very little to
11 do to get out of the bankruptcy.

12 Q. The case could be concluded tomorrow
13 by converting it to Chapter 7, right?

14 A. It would, and nobody would get
15 anything. Except the noteholders I guess I
16 would get a bonus.

17 Q. When you say nobody would get
18 anything, is that -- aren't there -- why do
19 you say that?

20 A. As we were discussing, I don't think
21 there are substantial assets in the estate.
22 I'm not up to date on the numbers, but my
23 general understanding is there wouldn't be any
24 money coming in that would flow to the



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1 creditors.

2 MR. KAPLAN: I have nothing
3 further.

4 THE COURT: All right, thank
5 you. Anyone else? Ms. Casey?

6 CROSS-EXAMINATION.

7 BY MS. CASEY:

8 Q. Good afternoon. Linda Casey on behalf
9 of the Committee -- excuse me, on behalf of
10 the U.S. Trustee.

11 I'm a little confused, and I
12 just want to see if I can drill down on one
13 point. I believe your testimony was you were
14 not aware who requested that the deficiency
15 claims be excluded from the distribution of
16 the cash portion of the GUC trust, correct?

17 A. Yes, that's correct.

18 Q. And I believe your testimony was that
19 you are not sure why they were excluded from
20 the distribution of the cash portion of the
21 GUC trust?

22 A. I think I expressed that I was not at
23 those discussions, so I really wasn't --
24 didn't have much direction as far as who



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1 requested which change and what the quid pro
2 quo might have been. It was give and take.
3 We got a little bit of a flavor of that from
4 counsel reporting back, but I wasn't there, so
5 I don't know.

6 Q. I'm not sure if you were asked and I'm
7 not sure if I heard, when the Committee
8 approved the settlement agreement, what did
9 the Committee rely upon to determine that the
10 exclusion of the deficiency claims from the
11 distribution of the cash portion was fair?

12 MR. KINEL: I'm going to object
13 to the extent it calls for attorney-client
14 communications.

15 THE COURT: Without saying the
16 substance, I mean, if you can answer the
17 question without disclosing any
18 attorney-client communication, or the
19 specifics of any attorney --

20 THE WITNESS: Can you restate
21 the question, please?

22 BY MS. CASEY:

23 Q. Yes. When the Committee approved the
24 settlement agreement, what did it rely upon to



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1 determine that the exclusion of the deficiency
2 claims from the distribution of the cash
3 portion of the GUC trust was fair?

4 A. Let me give you a little bit of a
5 flavor of what was happening as we looked at
6 these various versions, including the last
7 one. We would get reports from our
8 professionals of what had changed and what the
9 impact of that change was on us. They
10 typically would highlight the pros and cons,
11 people would have questions, and it would be
12 explained and discussed as to whether it was a
13 good thing or not. So I think without giving
14 any specifics, that's...

15 Q. Are you aware of any facts that would
16 justify the exclusion of the deficiency claims
17 from the distribution of the cash portion of
18 the GUC trust?

19 A. To justify the exclusion? Well,
20 there's the arithmetic and the economics. You
21 have parties involved who are negotiating who
22 are in equal bargaining positions which gets
23 you to a point where they'll willing to put
24 together a deal of this nature. But I'm not



1 sure what you're looking for in particular.

2 Q. I'm not sure what you mean by the
3 economics. Are you aware that there are
4 secured creditors in this case who have 100
5 percent deficiency claims and are not going to
6 be receiving any payments as a secured
7 creditor?

8 A. That's my understanding, yes.

9 Q. So are you aware of any facts that
10 would establish that a fully unsecured
11 deficiency claim, it is fair to not include
12 them with the other general unsecured
13 creditors sharing the cash portion of the GUC
14 trust?

15 A. If we were talking about the
16 distribution of assets of the Debtor, I would
17 be looking at it somewhat differently. But
18 we're looking at a third party making a
19 payment to a trust to give to the creditors,
20 giving them a lot more influence on how that
21 should be structured. So it's really not --
22 as I mentioned, I've seen this a few times,
23 but it's an unusual circumstance and not the
24 one contemplated by the code I think for the



1 most part.

2 Q. I'm a little confused. How is the
3 fact that the money is not the Debtors', if
4 you can't testify that the person providing
5 the money insisted that it not go to the
6 deficiency claims, affects the analysis as to
7 whether it's fair to exclude the 100 percent
8 deficiency claims?

9 A. Well, the end result is they accepted
10 a structure that had it that way, meaning they
11 thus approved it. Whether they proposed it or
12 not probably isn't all that relevant; they
13 approved it. And I would thus say that, you
14 know -- and it isn't money of the Debtor, it's
15 money being provided to a GUC trust from a
16 third party.

17 Q. So is it your testimony that the fact
18 that the Committee relied upon to exclude the
19 deficiency claims was that it wasn't money of
20 the Debtors?

21 A. That's a large component, yes, a
22 recommendation of professionals and so forth.

23 MS. CASEY: Thank you; no
24 further questions.



1 THE COURT: Any further
2 questions? Mr. Benson?

3 CROSS-EXAMINATION

4 BY MR. BENSON:

5 Q. Mr. Sass, first I want to clarify
6 something you said earlier. Did you say that
7 priority creditors are not included in the
8 class to which Committee professionals owe a
9 fiduciary duty?

10 A. I didn't say Committee professionals.
11 I was referring to the Unsecured Creditors
12 Committee. If I wasn't clear on that, I'm
13 sorry.

14 Q. I'll rephrase it. Did you say that
15 priority creditors are not within the class to
16 which Committee members, such as yourself, owe
17 a fiduciary duty?

18 A. I believe the fiduciary duty of the
19 members of the Official Committee of Unsecured
20 Creditors are to the unsecured creditors, not
21 the priority creditors.

22 Q. You've, I guess, distinguished
23 priority creditors versus unsecured creditors.
24 Are you aware that an unsecured creditor could



1 have a claim entitled to priority?

2 A. I'm sorry, say again?

3 Q. An unsecured creditor could have a
4 claim entitled to priority under section 507
5 of the Bankruptcy Code?

6 MR. KINEL: Objection; calls for
7 a legal conclusion.

8 MR. BENSON: He is --

9 THE COURT: He's an attorney.
10 I've known Mr. Sass my entire career. If he
11 can't answer this question, nobody in the room
12 can.

13 THE WITNESS: Can we restate it
14 one more time? Thank you, your Honor.

15 THE COURT: You're welcome.

16 MR. KINEL: Can we qualify him
17 as an expert, your Honor?

18 BY MR. BENSON:

19 Q. Are you aware that a priority
20 creditor -- withdraw that.

21 Are you aware that an unsecured
22 creditor could have an unsecured claim that is
23 entitled to priority under section 507 of the
24 Bankruptcy Code?



1 A. Yes.

2 Q. So the fact that a creditor is a
3 priority creditor is not exclusive with being
4 an unsecured creditor?

5 A. That's true, but the entire priority
6 structure relates to the property of the
7 Debtor and is contemplated that way under the
8 code. We're talking about property not of the
9 Debtor, which I don't think is contemplated.

10 Q. But we're talking about your fiduciary
11 duties and to whom they're owed. And are you
12 saying that your fiduciary duties are
13 inapplicable when dealing with non-estate
14 property?

15 A. It's an interesting question. I
16 haven't really thought about that. I don't
17 know.

18 Q. Okay. Moving on. I have some
19 questions similar to what I asked Mr. LaForge.
20 Are you aware that the IRS has filed proofs of
21 claim in this case?

22 A. Yes.

23 Q. Are you aware that the IRS has
24 asserted priority claims?



1 A. Yes.

2 Q. Are you aware that the IRS has
3 asserted priority claims in the approximate
4 amount of \$2.4 million?

5 A. That's a number I heard, yes.

6 Q. Do you have any reason to believe that
7 the asserted priority is invalid?

8 A. No, although I do believe that our
9 professionals reached out to the IRS more than
10 once to discuss whether to address that claim,
11 make some or all unsecured, and those attempts
12 to have been not fruitful.

13 Q. Two parts to that. Were those
14 attempts by the Committee to, I guess,
15 negotiate down the priority claim based on a
16 perceived inaccuracy as to the asserted
17 priority?

18 A. I don't know. I don't recall what
19 they were, where they arose from, but there
20 was a \$2.4 million claim out there.

21 Q. But you have no reason to believe that
22 the IRS erred in claiming a priority claim?

23 A. No, I have no information on that.

24 Q. Do you have any reason to believe the



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1 IRS erred in calculating the amount of the
2 claim?

3 A. I have no information on that.

4 Q. So you don't have any reason to
5 believe the claim is inaccurate in its --

6 A. I have no reason to believe it's
7 inaccurate, that's correct.

8 Q. Do you know if there's any intention
9 by the Committee or the Debtor to challenge
10 either the amount of priority the IRS has
11 claimed?

12 A. You know, we have the procedures that
13 have been promulgated under some of the
14 documents we've looked at, and there is a
15 claims procedure. It's intended for the
16 unsecured claims, but I guess if the IRS
17 wanted to come in as an unsecured claim and
18 assert it, we could have a discussion.

19 Q. That answer was about your ability to
20 challenge it. My question was is there any
21 intention to challenge it?

22 A. Not being in that position, I really
23 don't have any intention to do anything yet.
24 It's not ripe yet.



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1 Q. You mentioned your professionals
2 reaching out to counsel for the IRS. I want
3 to specifically talk about the period from the
4 petition date to the time the United States of
5 America filed an objection to the settlement.
6 At any time during that period, do you know if
7 anyone acting on behalf of the Committee
8 reached out to either the Internal Revenue
9 Service or the Department of Justice?

10 A. I don't have the dates, but I believe
11 so, but I'm not sure. I don't know when it
12 took place, so let me not say. I don't know.

13 Q. When you say let you not say, are
14 you --

15 A. I don't know when the dates were that
16 they reached out.

17 Q. Okay. So you have --

18 A. Relevant to the IRS.

19 Q. Do you have any reason to believe that
20 there was any attempt to reach out to the IRS
21 before the sale hearing, for instance?

22 A. Again, I don't know the timing
23 relevant to the other events.

24 Q. Do you know if there was any attempt



1 by the noteholders to reach out to the
2 Internal Revenue Service from the petition
3 date to the sale hearing regarding treatment
4 of their priority claim?

5 A. I do not know.

6 MR. BENSON: That's all I have,
7 your Honor.

8 THE COURT: Thank you,
9 Mr. Benson. Any other questions? Any
10 redirect, Mr. Kinel?

11 MR. KINEL: Thank you, your
12 Honor.

13 REDIRECT EXAMINATION

14 BY MR. KINEL:

15 Q. Mr. Sass, if you could just turn back
16 again to Committee 3, the term sheet.

17 A. Yes, I have it.

18 Q. I want to just direct your attention
19 to the bottom of page 4, the last full
20 paragraph. It starts with the net proceeds.

21 A. I have that.

22 Q. Take a moment, just read it to
23 yourself.

24 Having read that, the Committee



1 approved a settlement that does provide a
2 recovery to deficiency claims of secured
3 creditors; is that not correct?

4 A. Yes, thanks for refreshing my memory.
5 There is a provision that provides for some
6 payment to the deficiency claims.

7 Q. So deficiency claims such as
8 Mr. Kaplan's clients would share in the net
9 proceeds and any specified causes of action?

10 A. That's correct.

11 MR. KINEL: Thank you; no
12 further questions.

13 THE COURT: Thank you, Mr. Sass.

14 THE WITNESS: Thank you.

15 THE COURT: Any further evidence
16 by any party? Mr. Kinel, you need to move
17 your documents. I assume you want 1 through 3
18 admitted?

19 MR. KINEL: Yes, your Honor.

20 THE COURT: Any objection?

21 MR. KAPLAN: No objection, your
22 Honor.

23 THE COURT: Committee Exhibits 1
24 through 3 are admitted without objection.



1 Mr. Kaplan, you had some
2 documents?

3 MR. KINEL: Your Honor, I have
4 one more.

5 THE COURT: Oh, you have one
6 more? Okay. Sorry.

7 MR. KINEL: May I approach?

8 THE COURT: Yes.

9 MR. KINEL: Your Honor, we'd
10 like to move Committee 4, which is an official
11 transcript of a hearing held before this court
12 on October 6, 2016.

13 THE COURT: Any objection?

14 MR. KAPLAN: No objection, your
15 Honor.

16 THE COURT: It's admitted.

17 MR. KINEL: Thank you, your
18 Honor.

19 MR. KAPLAN: Your Honor, we have
20 several documents that we used, and that's
21 DDTL 1 through 8, which are the tabs in our
22 binder, tab 17, 18, 19, 20, 21, 22, and 24.

23 THE COURT: Any objection?

24 MR. KINEL: For the record, I'm



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1 going to object, but I know it will be
2 overruled.

3 THE COURT: Based on relevancy,
4 I take it?

5 MR. KINEL: Yes.

6 THE COURT: That is overruled,
7 so they're admitted.

8 MR. KAPLAN: And your Honor, I
9 know the Debtors' binders have a lot of
10 pleadings that are already on the docket. I
11 think the Court can take judicial notice;
12 we're not going to burden the record unless
13 you want us to move in all of the different
14 pleadings into the record. But there's a
15 whole host of pleadings that relate to this,
16 and we think the record -- we don't think they
17 need to go in as evidence by evidence.

18 MR. KINEL: I would agree with
19 Mr. Kaplan on that.

20 MR. RAMOS: No objection.

21 THE COURT: I'm not going to
22 disagree.

23 MR. KAPLAN: Thank you.

24 THE COURT: Very good. All



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1 right. Last call? That will close the
2 evidentiary record. Let's break for lunch,
3 then we'll hear argument when we return. And
4 let's try to reconvene promptly at 2:00 p.m.,
5 if we could. Thank you very much.

6 MR. KINEL: Thank you, your
7 Honor.

8 (Whereupon, a lunch recess was
9 taken.)

10 THE COURT: Good afternoon.

11 MR. SHAPIRO: Good afternoon,
12 your Honor. For the record, Zac Shapiro on
13 behalf of the Debtors.

14 I just have a few remarks, and
15 I'll save the balance in response, if that's
16 all right.

17 What's before your Honor is a
18 settlement. And the standard that your Honor
19 should consider is whether the settlement
20 falls above the lowest point in the range of
21 reasonableness. The standard is not whether
22 everyone is happy. That simply can't be the
23 standard. If it was, no settlement would ever
24 be approved. For example, often the parties



1 to the settlement themselves aren't happy. So
2 I think, your Honor, while the settlement
3 isn't perfect, it achieved something good, and
4 it did so at no cost to the Debtor.

5 You can argue about the merits
6 of the Committee's objections, you can argue
7 about the timing of when everything happened.
8 But what you can't argue is as a result of the
9 Debtor agreeing to move forward with this
10 settlement at the August 16 hearing, subject
11 to final documentation, that we gained the
12 support of the Committee. And you can't argue
13 that that support doesn't mean something.
14 Therefore, for that reason, the Debtors would
15 submit that this settlement meets the relevant
16 standards and should be approved.

17 MR. KINEL: Thank you, your
18 Honor. Norman Kinel, Squire Patton Boggs, on
19 behalf of the Committee.

20 There are actually two motions
21 pending before your Honor, so I'll mention the
22 second one, and that is the Committee's motion
23 for entry of an order approving the
24 liquidating trust agreement and the binding



1 claims mediation agreements.

2 Your Honor, as I said earlier
3 this morning, the settlement is the best
4 possible outcome in these cases for the
5 creditor body as a whole, and the only outcome
6 in which any constituency other than the
7 senior secured creditors receive anything in
8 consideration of their claims against the
9 Debtors. If the objectors today prevail, it
10 will not improve their position, but rather
11 simply ensure that unsecured creditors will
12 receive no recovery in these cases.

13 The settlement clearly settled
14 the Committee's DIP motion and non-CSC sale
15 motions. And as we said in our papers, the
16 best indicator of the value of the Committee's
17 claims and the Committee's position is what a
18 third party was willing to pay to get rid of
19 those objections, and what the Debtors were
20 willing to pay to get rid of those objections.
21 Mr. LaForge, I don't know if he used the word
22 today, but during his deposition, he testified
23 it would have been catastrophic if either of
24 those motions had not been approved. And



1 whether or not they were approved together on
2 the same day or whether there could have been
3 a possibility of coming back and dealing with
4 a DIP later, obviously this was an integrated
5 settlement that addressed a number of issues.

6 It also meets the standards of
7 9019 because it certainly does not fall below
8 the lowest point in the range of
9 reasonableness. From Mr. LaForge's testimony,
10 it's simply not possible to conclude that it
11 was unreasonable for the Debtors to have
12 accepted this settlement. And his unhappiness
13 had largely to do with the fact that there
14 were not additional releases given to other
15 parties who remain potential targets in the
16 settlement.

17 The settlement resolved highly
18 contentious litigation, and the objecting
19 parties would like to create a narrative where
20 somehow the timing is suspicious, somehow
21 there wasn't enough time for people to
22 consider the settlement. I can assure the
23 Court that there was a hard-fought
24 negotiation, that while Mr. LaForge may not



1 have been involved and as Committee members
2 were not involved, counsel for all parties
3 were involved. And the Committee had pending
4 DIP objections, had filed three different
5 objections to the DIP that were still pending,
6 had objections to the sale motion. And
7 there's no question that something was settled
8 on August 16, 2016.

9 The standard that the parties
10 would have this court require for a settlement
11 that a claim or cause of action in particular
12 was settled is not a -- there's no authority
13 for that, and it's not a realistic standard.
14 Settlements are approved every day in this
15 court and other bankruptcy courts around the
16 country which resolve controversies. That's
17 all the rule says. You can resolve a
18 controversy or settle a matter, but there's no
19 requirement as to there being property of the
20 estate involved in the settlement.

21 What was before your Honor were
22 two core proceedings. A motion to approve a
23 sale and a motion to approve final DIP
24 financing. Admittedly, that was being



1 adjourned, but in the broader sense, they were
2 both before the Court. There's no doubt,
3 those core matters, the Court had jurisdiction
4 over. And there was no objection at the time
5 of sales, of the sale or the DIP objection, to
6 the court's jurisdiction to hear those
7 matters. If the court had jurisdiction to
8 hear them, the Court certainly had
9 jurisdiction to settle them. And that's all
10 that was put on the record. And I'm not sure
11 what counsel is getting that there's some
12 deviation between what was put on the record
13 and what ultimately was approved. The core
14 terms of the settlement were put on the record
15 by counsel for the noteholders, they were
16 echoed by my partner who was here that day,
17 and they were also confirmed by the Debtors.
18 And those terms were the economic terms of the
19 settlement, and those have never changed
20 throughout.

21 What has changed, what counsel
22 pointed out and of course we objected as to
23 the relevancy of those changes, is there were
24 many iterations of a term sheet that went back



1 and forth over a period of a couple of weeks
2 between three different sets of counsel, with
3 each taking a look at the document and making
4 whatever suggestions, improvements, or changes
5 they believed appropriate. There's no
6 evidence that this was a Jevic plot. As a
7 matter of fact, I sort of find that comical,
8 because Jevic, if it were applicable, and we
9 maintained throughout it was not, would have
10 supported the settlement. So the idea that
11 lawyers were running around conspiring to
12 structure a settlement that would address a
13 Supreme Court ruling that wasn't going to come
14 for six months in the future, is kind of
15 ridiculous.

16 The economics were always the
17 same. The APA from the very first day, before
18 the Creditors' Committee was ever even formed,
19 provided that the purchaser would purchase all
20 claims and causes of action. And there were
21 excluded assets, but those were a small subset
22 of the assets that were purchased. And from
23 the beginning until the end, that never
24 changed. And while in hindsight some of the



1 wording in the term sheet may not have been
2 the best, no matter how many lawyers looked at
3 it, it's clear that the economics were always
4 the same. There was no wandering of estate
5 assets. This is what you heard Mr. LaForge
6 testify earlier today, that he fought hard to
7 keep those assets within the estate. It's
8 exactly the opposite of what the other parties
9 are contending. It's not that people
10 conspired to get them out of the estate and
11 then sent them to a GUC trust. The Debtors
12 agreed to give those up before the Committee
13 even was alive and kicking.

14 We're going to hear from the
15 objectors about Jevic. I argued before your
16 Honor on I think it was December 16th when we
17 had essentially a status conference on Jevic
18 and whether the settlement should go forward
19 on that day. We argued that Jevic was
20 inapplicable. And the Supreme Court's ruling
21 has not changed that argument one bit in our
22 opinion. The Supreme Court in Jevic dealt
23 with a case-ending dismissal coupled with a
24 settlement in a distribution of predominantly



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1 property of the estate, and how that was not
2 permitted where it was inconsistent with
3 normal code priorities, and if the settlement
4 lacked any Bankruptcy Code offsetting value.

5 The Court expressly declined to
6 prohibit other non-case ending distributions
7 which occur earlier or do not involve property
8 of the estate or have other code-based
9 justifications. It did not endorse a blanket
10 rule that all structured dismissals are pro se
11 and valid.

12 The settlement here falls
13 squarely within the range of permitted
14 settlements and distributions under Jevic.
15 The deciding factor in Jevic and the one
16 missing here is that Jevic involved
17 predominantly the distribution of estate
18 assets. It is not uncontroverted, it wasn't
19 in December, because I remember your Honor
20 indicating that we would need to have an
21 evidentiary hearing as to whether estate
22 assets were being transferred or not. I
23 believe it is uncontroverted that no estate
24 assets are contributed; and indeed, the



1 Debtors have modified the proposed form of
2 order to specifically say that to allay any
3 misconception, misperception, or poor
4 draftsmanship that might have been involved
5 along the way. So this is not Jevic.

6 The Court approved the CSC sale
7 and the non-CSC sale. The appeal period
8 passed; no appeal was filed. The sale closed,
9 and it's now beyond legal challenge. The
10 purchased assets as defined in the APA became
11 property of the noteholders at closing. They
12 cannot be considered property of the estate.
13 Under the settlement, the purchased assets
14 include the specified causes of action, and
15 accordingly, the settlement contemplates the
16 contribution of only non-estate property to
17 the GUC trust.

18 The DDTL parties do not dispute
19 that the settlement calls for a transfer of
20 the specified causes of action by the
21 purchaser, and they do not allege the
22 distribution of estate assets will be made to
23 the GUC trust. Because of this, they argue
24 that the distinction between property of the



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1 state and non-estate property is not relevant
2 to Jevic and that it's a fallacy. Your Honor,
3 we assert that the Supreme Court's decision
4 turned precisely on that issue, and in our
5 brief, we go through the transcripts of the
6 Jevic hearing, what various of the justices
7 said. And it is clear that the issue of a
8 non-estate property distribution is not
9 decided by the Supreme Court.

10 On the other hand, we have ICL
11 Holdings, binding precedent in this
12 jurisdiction. And as hard as the objecting
13 parties might try to distinguish it, I see no
14 distinguishing characteristics between ICL and
15 this case.

16 I also see nothing that renders
17 it non-viable or controlling at this point.
18 The dispositive issue in ICL Judge Ambrose
19 said was whether there was a distribution of
20 estate assets in violation of the priority
21 scheme. Absent a finding that estate assets
22 were involved, there could be no priority
23 violation, and the Court found that estate
24 assets were not implicated.



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1 This case is virtually identical
2 to ICL. The purchaser has acquired
3 substantially all of the estate's assets. The
4 purchaser is contributing them, some of them,
5 to a trust. That trust will make
6 distributions to unsecured creditors together
7 with additional funds from the noteholders.

8 The claims and causes of action
9 that will be contributed were purchased by the
10 purchaser and belong to them. The \$1.25
11 million that is chartered to go to unsecured
12 creditors is coming from the noteholders
13 pockets. Those were funds that were never in
14 the estate, were never part of the
15 consideration. The \$1 million funding for the
16 GUC trust, the exact same thing applies.
17 There is nothing coming from the estate.

18 So for these reasons, we believe
19 that Jevic is inapplicable, and ICL is good
20 law and in fact binding precedent here.

21 The U.S. Trustee would like to
22 extend Jevic and ask this court effectively to
23 do so, and to take up the solicitor general's
24 arguments during oral argument, and wants to



1 turn this into a gifting case or a
2 class-skipping case which involved property of
3 the estate and which involved a plan scenario
4 or some other scenario which is not this
5 scenario. This is not a gifting case. This
6 is a case -- this is not a class-skipping
7 case. This is a case where a settlement was
8 reached and where through an arm's length
9 negotiation, a third party has agreed to
10 provide funding and other assets to a trust
11 for the benefit of unsecured creditors.

12 U.S. Trustee also attempts to
13 distinguish ICL in four ways. Mentioning
14 releases that the secured lenders and others
15 were getting. However, that argument fails,
16 because all of those claims were released at
17 the time that the final DIP order was entered.
18 In fact, they were released by the Debtors on
19 the first day of these cases pursuant to the
20 stipulations set forth in the first interim
21 DIP order. They became final after the
22 Committee six days before this settlement was
23 reached. There was no ability to challenge
24 them. That was actually the U.S. Trustee's



1 second argument as to why this is different
2 than ICL.

3 U.S. Trustee also argues that
4 certain payments for Committee counsel somehow
5 implement each other. That's simply not
6 correct. The fees that were set forth in the
7 DIP orders were capped. The fees for
8 Committee counsel throughout the cases. And
9 as part of the settlement term sheet, one
10 component was an increase in that cap, and an
11 elimination of a sub-cap that had been in all
12 the orders. This was not a gift through a
13 carve out as the U.S. Trustee has alleged, but
14 it was a settlement, part of a settlement of a
15 final DIP order which is hardly unusual. The
16 funding did not come from anyone's collateral,
17 it did not come from estate assets, it came
18 directly from the increase in the cap which
19 was funds that were negotiated as part of this
20 settlement.

21 I should also note that the
22 analysis falls apart, because attorneys's fees
23 are administrative expenses of the Debtors'
24 estates. So under any scenario , those funds,



1 administrative claims would have to be paid
2 before priority claims or unsecured claims,
3 even if we were dealing with estate property
4 and even if we followed the absolute priority
5 rule. So we don't believe there's any
6 applicability to that argument.

7 I want to address a few other
8 issues, and then I will end for now. Part of
9 what your Honor has to consider is the
10 fairness and the appropriateness of the
11 settlement, and there was testimony regarding
12 whether it's fair to skip over the IRS,
13 whether it's fair for the noteholders'
14 unsecured deficiency claim to be treated
15 differently. Not excluded, but to be treated
16 differently under the settlement.

17 And the question came up during
18 Mr. Sass's testimony as what duties does an
19 unsecured creditors Committee have to priority
20 claimants and to unsecured deficiency
21 claimants or under-secured secure creditors
22 who have deficiency claims? This is an issue
23 we've thought long and hard about. And while
24 it may seem one that most bankruptcy lawyers



1 would think there's an easy answer to, I hope
2 the Court can trust me, there is no easy
3 answers to those questions.

4 There is precedent, however, and
5 I'll cite to SPM Manufacturing Corp, 984 F.
6 2d. 1305 for the proposition that
7 specifically that a Committee's appointment
8 pursuant to 11 U.S.C. Section 1102 charged it
9 only with representation of the general
10 unsecured creditors, not with representation
11 of the IRS or other priority creditors. That
12 case was superceded on other grounds. That's
13 one case that we were able to locate on that
14 specific issue.

15 With respect to deficiency
16 claimants, the Court in In Re: Fidelity
17 American Mortgage Code, 1981 Bankruptcy Lexus
18 3272, recognized that the interests of an
19 unsecured creditors committee and an
20 under-secured creditor very well might be
21 different, and suggests that an unsecured
22 creditors committee's fiduciary duty may only
23 be to general unsecured creditors. I will
24 submit that we found no binding authority on



1 that particular issue.

2 But let's talk for a moment
3 about the objectors in this case. And as
4 counsel indicated, a lot of people aren't
5 happy. But let's look at who they are. So we
6 have the DDTL lenders. They're a secured
7 creditor. And I had marked as Committee 4 the
8 transcript of the October 16th hearing before
9 this court. If I could only put my hands on
10 it, it would be great. I don't know if your
11 Honor has it before him. But the transcript,
12 the hearing that day was about the DDTL
13 lenders' motion for a \$5 million
14 administrative claim. Your Honor ultimately
15 denied that motion. However, throughout that
16 transcript, there are numerous references by
17 Mr. Kaplan on behalf of the DDTL lenders and
18 to the court to the secured status of the DDTL
19 lenders. Specifically, your Honor held on
20 page 66 of the transcript, "As we sit here
21 today, they have an allowed secured claim in
22 the amount listed on the Debtors' schedules.
23 That is the law."

24 That followed several places in



1 the transcript where Mr. Kaplan argued that
2 his client was a secured creditor and his
3 collateral had diminished during the case.

4 On page 12 of the transcript, I
5 can quote him as saying -- I apologize; wrong
6 cite. On page 51 of the transcript,
7 Mr. Kaplan says, "Your Honor, that simply
8 can't be true that a secured creditor who the
9 Debtors corrected, they originally said we
10 were listed as a contingent claim, were
11 disputed, and we were not; it was part of the
12 proffer. So we have a prima facie valid
13 secure claim. We have a claim that the
14 Debtors have acknowledged they have done no
15 investigation whatsoever of any claims."

16 Mr. Kaplan goes on on page 53,
17 "Let's take a look at some of the other
18 arguments that they make. As I said, we talk
19 about the fact that, well, we were never
20 unsecured. We were never a secured claim.
21 Because of the petition date, we were
22 unsecured." But they have no basis for that.
23 The only basis they attempt to argue is, well,
24 look at the auction results. But the auction



1 results actually prove the complete opposite.
2 Because as we have noted in our papers, the CE
3 Star transaction contemplated paying off their
4 PNC facility with a first lien on their
5 revolving priority collateral in full
6 regardless of the outcome of the Columbus
7 sale. So even if the Columbus sale had
8 generated zero proceeds, the PNC was paid off
9 in full.

10 There's another reference of
11 Mr. Kaplan on page 16 of the transcript. "So
12 in sum, your Honor, I think the evidence is
13 uncontroverted and crystal clear that there
14 has been diminution of value, that we have a
15 prima facie allowed claim, that we have a
16 diminution of value under the DIP order."

17 Then your Honor says to the
18 Debtors on page 64, "You schedule them as
19 undisputed as a secured creditor that the
20 claim is allowed."

21 And finally, in Your Honor's
22 ruling on page 100 -- I particularly like this
23 passage because your Honor made the
24 observation that I said something astute that



1 day. On page 100, your Honor said, "To my
2 point to that question, is the value of your
3 collateral actually may not have diminished,
4 it may have increased. I don't know, because
5 you haven't established what the value of your
6 collateral is on the petition." That was Your
7 Honor's ruling in denying the motion.

8 For the DDTL lender to stand up
9 today and argue, woe is me, we're an unsecured
10 creditor, we haven't been treated fairly, yet
11 in October, months after the settlement, they
12 came before this court and said, we're a
13 secured creditor. And your Honor found that
14 there was no value that's been proven as to
15 what their collateral is worth. So the idea
16 that the Unsecured Creditors' Committee should
17 have somehow figured out at some point along
18 the way in these cases that they were an
19 under-secured creditor and that we owed some
20 fiduciary obligations to them, notwithstanding
21 that they were represented from the very first
22 day by very able counsel who was clearly able
23 to advocate for its interests.

24 So to rely on the idea that



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1 they're being discriminated against unfairly
2 because they're an unsecured creditor and the
3 Committee has, whatever Mr. Sass says, and I
4 have the utmost respect for Mr. Sass, as I
5 said earlier, there's not a lot of authority
6 on this. But if you look at the situation
7 practically, I think the Committee could only
8 have been said to discharged its duty to
9 general unsecured creditors. Priority
10 creditors are different. Mr. Kaplan's client
11 is different.

12 The IRS filed two priority
13 claims. Did they do anything to protect their
14 interest in these cases? No, they didn't do
15 anything. They weren't heard from throughout
16 the cases. They were never in the process.
17 They could have come in and objected to the
18 sales motion, they could have objected to the
19 DIP financing, they could have objected to the
20 settlement terms when they were put on the
21 record. They didn't do anything during the
22 cases. Instead, the Committee was aggressive
23 and went out and tried to create value for its
24 constituency. And now that that value has



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1 been created, they want to jump on the
2 bandwagon and receive a portion of that
3 distribution. Number one, it's not property
4 of the estate, it's not the estate's assets,
5 and if they wanted to be involved and if they
6 want to have a voice in these cases, you don't
7 come in in the 11th hour and try to take away
8 what was heavily negotiated months earlier.

9 They also didn't come in here
10 and complain when the employees who also hold
11 priority claims, when millions of dollars was
12 set aside for them. I didn't see the IRS here
13 that day when those arrangements were made.
14 Why didn't they object to that? Why are we
15 now? Why was it okay for millions of dollars
16 in priority claimants to be paid ahead of
17 others?

18 That leads me to the WARN
19 claimants who are the last people who should
20 be here objecting. If I were them, I wouldn't
21 come anywhere near this courtroom. They're
22 being paid in violation of the absolute
23 priority rule, exactly what they're alleging
24 today, assuming that their argument holds up



1 that somehow these are estate assets or are
2 controlled by Jevic. Why were they getting
3 paid? What is the basis for that? They
4 shouldn't be objecting, they should be
5 grateful that that money was set aside for
6 them specifically, and their objections really
7 don't go to this settlement, it goes to the
8 fact that they are being forced to litigate
9 the validity of their claim, and not simply
10 being handed all those funds. And by the way,
11 any funds that aren't handed to them from that
12 pot go back to the noteholders.

13 So that leads me to my
14 conclusion, at least for now, and that's the
15 noteholders. I want to give them credit, your
16 Honor. They are sitting pretty today, because
17 if the court rules against and does not
18 approve the settlement, they walk off with two
19 and a quarter million dollars plus all kinds
20 of causes of action that otherwise are going
21 to go to general unsecured creditors. To
22 their credit, they have stood by the
23 settlement, have not tried to weasel out of
24 it. I give them a lot of credit for that.



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1 They have been supportive throughout, and
2 certainly have earned the respect of me and
3 the Committee. And are here today, even, and
4 I'm sure will comment, if necessary.

5 But as much as they have earned
6 our respect and as much as we had a hard
7 fought negotiation, it would be inappropriate
8 for them to walk away today with a
9 multi-million dollar windfall, and I think
10 they understand that, and that's why they have
11 been supportive. And that's what they will be
12 handed if this settlement is not approved.

13 Your Honor, we urge the Court not to set a
14 precedent today that would reverberate around
15 the country, that out of the money unsecured
16 creditors shouldn't even waste their time at a
17 Chapter 11 case such as this in trying to
18 obtain a recovery for their constituency.

19 The secured creditors in these
20 cases got recoveries, they got assets, the DIP
21 letter got paid off. But we often talk about
22 paying the freight and using the process and
23 not abusing the process. And I would
24 respectfully submit that's exactly what



1 occurred here. The process played out as it
2 should. Unfortunately, this was not a case
3 where a plan could be confirmed and the
4 Committee created significant leverage, was
5 able to obtain a settlement for its
6 constituency. And it would be respectfully a
7 terrible shame if they weren't able to realize
8 on that after all this effort. Thank you,
9 your Honor.

10 THE COURT: Thank you.

11 MR. KAPLAN: Your Honor, Gary
12 Kaplan from Fried Frank on behalf of the DDTL
13 parties. I have some slides that I want to
14 put up, but before I do that, I just want to
15 respond to a couple of the points.

16 First, I always love when I lose
17 in a hearing and somehow all of my arguments
18 are quoted back to me. There was a
19 fundamental change since that hearing, and
20 that is my collateral is gone, it was sold. I
21 have no collateral left. We have an estate
22 that everybody has admitted has no assets
23 left. So then to argue, no, they're really a
24 secured creditor because they argued pre sale



1 closing that they were a secured creditor is a
2 little bit ridiculous. I wish I was a secured
3 creditor, I wish I still had my collateral
4 here, but that ship sailed a long time ago.
5 So we are a completely unsecured creditor,
6 have been for some time, and it was well-known
7 to the Committee when they were negotiating
8 that there was no collateral left and no value
9 left for us.

10 Your Honor, I'll put up the
11 slides. If it will be helpful, I can hand you
12 a hard copy, as well.

13 THE COURT: That would be great.
14 Thank you.

15 MR. KAPLAN: So your Honor, yes,
16 Mr. Kinel was right, we are going to start
17 with Jevic, because we think it's pretty clear
18 that what's happening here is simply a
19 back-door means to avoid Jevic, move assets
20 that the documents themselves are very clear,
21 or at least at the time of this settlement
22 contemplated to go into the estate, and then
23 in a change which no witness could explain who
24 insisted on it, why it was there, there was



1 certainly zero testimony that the purchaser
2 insisted on it, somehow it shifted from assets
3 being left behind in the estate and words of
4 Debtors' counsel, and we'll go through the
5 exhibits, Debtors' counsel changed it and made
6 it crystal clear that the APA was to be amend
7 sod that there would be excluded assets, and
8 then contributed to the GUC trust by the
9 Debtor. You have some very talented lawyers
10 on that side that everybody all of a sudden is
11 saying, oh, gee, that's not what we meant,
12 never meant it, I guess it was really sloppy
13 by the multiple firms from the Committee, from
14 the Debtor, everybody was sloppy, everybody
15 who was using defined terms somehow just
16 completely messed up term sheet after term
17 sheet after term sheet. Even in the documents
18 that say this was the agreement, crystal clear
19 these assets were to come into the estate, be
20 contributed by the Debtor to the trust, then
21 all of a sudden, and it's something that
22 nobody, no witness could explain why there was
23 a change, but all of a sudden, we got a change
24 that now these assets are not going to be



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1 excluded assets, but rather they're going to
2 go to the purchaser.

3 And so as when I started my
4 opening about the boy who kills his parents,
5 they made this change. If they had kept the
6 term sheet as it was when it was announced,
7 then we wouldn't be dealing with this issue
8 and we wouldn't be, and we wouldn't be
9 standing up saying, woe is me, if you deny
10 this, your Honor, we're not going to get
11 anything. Because under the terms of this,
12 the estate would be getting these causes of
13 action.

14 The Committee says just ignore
15 all of it, the only thing that's relevant is
16 to look at the final and ignore all of the
17 facts and all of the background.

18 And then if we continue on in
19 Jevic, I notice Mr. Kinel's terminology
20 changed a little bit from their pleadings to
21 now when they say predominantly. Jevic
22 involved predominantly estate assets.
23 Admittedly it wasn't the focus of the court,
24 it wasn't argued in Jevic about the estate



1 versus non-estate asset distinction, but the
2 facts in Jevic are pretty close to the facts
3 here. Okay, we had CSC contributing cash and
4 some contributing a lien. They had assets
5 subject to a lien, they contributed. Neither
6 of those are estate assets, and based on the
7 same theory that's being used today, neither
8 of those are estate assets. Granted, it
9 wasn't argued, but to make this distinction
10 and say Jevic was crystal clear, it was only
11 focused on estate assets, well, when the facts
12 according to them were all non-estate assets,
13 it means there's something wrong; the Jevic
14 decision just doesn't make sense.

15 And this settlement here clearly
16 involves estate assets or estate value, if you
17 want to go to Armstrong and the gifting cases.
18 You have funding to pay estate professionals.
19 You have, again, requiring an increase of the
20 wind-down budget, and directing how the funds
21 are going to be spent, including buying tail
22 insurance for the company's directors. It
23 provides for a lease by the Debtors, and to
24 this point, Mr. Kinel said, oh, no, well



1 remember the challenge period had expired, so
2 the noteholders got releases. Yes, but the
3 settlement term sheet contemplates broader
4 releases than that. For example, the Debtors'
5 officers, directors, agents, affiliates, et
6 cetera, are not obviously released by the fact
7 that the DIP challenge period expired, and yet
8 under the terms of the settlement, there are
9 these broad releases that goes to the parties.
10 So you get broad releases, including by the
11 Debtor of their claims against officers, et
12 cetera. So you do have estate assets that are
13 being dealt with by the releases.

14 This settlement involves the
15 Debtor continuing to be involved in the claims
16 reconciliation process. This isn't some
17 assets outside the estate that the Debtor has
18 nothing to do with; the Debtor has to be
19 involved. Then you have the pursuit of
20 Chapter 5 and other causes of action, which we
21 dealt with a lot in our brief and I'm not
22 going to belabor it now. But you have, again,
23 it goes to, and I hate when we use the word
24 launder, but you have estate causes of action



1 that under the Bankruptcy Code can be brought
2 by the trustee or the Debtor on behalf of
3 creditors, and somehow they're saying, well,
4 those were purchased for a moment and now back
5 in the estate, and the estate can now somehow
6 bring those causes of action. And if those
7 causes of action can only be brought by the
8 estate, and there have been some courts that
9 have granted standing where it benefits the
10 estate. But here they're saying there is zero
11 benefit to the estate because it's outside of
12 the estate, that, Judge, frankly doesn't make
13 sense to say we're going to have a settlement
14 that transfers those assets to a
15 court-approved trust that is now going to be
16 able to pursue it.

17 And so, you know, part of Jevic
18 was very clear, and as discussed, the Supreme
19 Court was very clear that talked about that
20 there are certain times where you can have
21 non-priority or priority-violating
22 distributions where there's a significant
23 bankruptcy related objective. And the
24 situations they talked about was contributing



1 to the reorganization. And here, and in Jevic
2 they found, as your Honor knows, that when it
3 was attached to a final disposition, it didn't
4 preserve the Debtor as a going concern, and it
5 didn't promote the possibility of a
6 confirmable bound. There was no bankruptcy --
7 there was no reason to approve it, and
8 certainly no objective of the Bankruptcy Code
9 that would be further.

10 And the same is certainly true
11 here. In fact, and going to the woe is me
12 argument at the end, again, that was the
13 argument in Jevic. The creditors will get
14 nothing. If you deny this, if you overturn
15 it, we will get nothing. And the Third
16 Circuit said that was a justification, and
17 Jevic said, no, that's not. The fact that
18 certain creditors will not get the benefit of
19 what they bargained for, if it violates the
20 code, that doesn't matter, and that's not the
21 appropriate justification. And that is the
22 only justification that has been posited.

23 And one of the things that I
24 think is important was that, you know, there's



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1 an argument, oh, your Honor is going to set
2 this major precedent on limitation of Jevic.
3 Frankly, I don't think your Honor needs to go
4 that far. This case, you don't need to get
5 into the contours of Jevic. Frankly, you can
6 say, I can leave Jevic to another day as to if
7 it's non-estate assets, whether it can be a
8 priority skipping distribution. Because here
9 you're clearly dealing with estate assets.
10 And so your Honor can rule on this and say,
11 we'll deal with Jevic another day, and
12 Mr. Kinel and other committees want to come in
13 some other time and say Jevic still exists,
14 that under Jevic I still have the ability to
15 do this, that may or may not be true. But
16 certainly under the facts here, we are not
17 dealing where a clear issue of non-estate
18 assets, we are dealing with estate assets that
19 we're trying to sort of create this fiction to
20 say they're not estate assets for today.

21 Then we turn to ICL, which,
22 again, there are questions about whether ICL
23 continues to be viable under Jevic. Again,
24 not something that frankly needs to be



1 addressed today, because this is clearly
2 distinguishable from ICL. And when you look
3 apartment what ICL did, and in our brief
4 reattached the term sheet that was approved in
5 ICL. And what you had in ICL was a simple
6 cash contribution, period, and that was it.
7 Avoidance actions were purchased and then
8 eliminated, versus here where you have them
9 contributed back and then being pursued, which
10 is a fundamental difference. You had
11 Committee Chapter 11 fees. ICL just had a
12 little bit of fees just for their distribution
13 of the trust, that permitted them to use some
14 of the trust funds for when they distributed
15 the assets. This is actually dealing with
16 incurred fees during the course of a Chapter
17 11 case.

18 And again, I talked about
19 earlier the Debtors acted in the
20 reconciliation and the releases. But I think
21 the quote at the bottom from ICL shows the
22 distinction between ICL and this case. And
23 there, the Court was talking about Armstrong
24 and talking about TSIC, and the Court found,



1 and this was the quote from the Court, the
2 trustee presented no evidence that the
3 settlement funds were, quote, otherwise
4 intended for the Debtors' estate. All are
5 true here. The settlement sums paid by the
6 purchaser were not proceeds from its liens,
7 did not at any time belong to Life Care's
8 estate, and will not become part of its estate
9 even as a pass-through.

10 We have showed and the documents
11 show absolutely definitively that these were
12 assets of the Debtors' estate, and then, in
13 fact, at the time of the settlement, they
14 contemplated through mean assets of the
15 Debtors' estate, and it was only through this
16 mechanism and through, you know, changes to
17 the term sheet that they now flipped it and
18 said we're going to move these assets outside
19 of the Debtors' estate.

20 And that takes us to
21 jurisdiction. Your Honor, we don't disagree
22 with the fact that obviously if they settle a
23 DIP objection or settle the sale objection,
24 and that your Honor has jurisdiction to hear



1 that settlement. But there's a limitation to
2 that jurisdiction. They would have that say
3 as long as it's in connection with resolving a
4 DIP, anything in the world that happens, even
5 if it's between third parties, no matter what
6 the claims are, that now resides with you and
7 you're stuck with it, your Honor. And we can
8 put in our agreements that bankruptcy court
9 has exclusive jurisdiction, they get all the
10 benefits of the different provisions of the
11 Bankruptcy Code.

12 That frankly can't be, and it
13 just doesn't work that way. If what they are
14 saying is true, that your Honor, don't worry
15 about the Bankruptcy Code, and we don't have
16 to worry about fiduciary duties because this
17 is not estate assets have nothing to do with
18 either the purchaser directing it, these are
19 outside the bankruptcy court. If that is
20 true, how can your Honor hear claims that are
21 being brought by this non-debtor party that
22 has nothing to do with the estate against
23 third parties? And your Honor is going to
24 hear them, there's core matters related, how



1 are those related if those are assets that are
2 not part of the Debtors' estate, according to
3 them, it's just the purchaser gratuitously
4 giving money off to the side. Your Honor
5 can't hear those. The bankruptcy court
6 wouldn't have jurisdiction overall of those.
7 Yet they want your Honor not only to hear
8 those, they want the chapter 5 actions to
9 somehow be resurrected, and they want your
10 Honor to establish procedures where every
11 claimant who is, again, apparently some third
12 party creditors who will have claims against
13 this non-Debtor asset that has nothing to do
14 with the Chapter 11 so we don't have to worry
15 about Jevic, we don't have to worry about
16 absolute priority. And your Honor should
17 mandate how they go and seek those funds and
18 require mediation and all of that. Your Honor
19 has to, in essence, create a new sort of
20 Bankruptcy Code just for those type of
21 distributions. And your Honor, we submit that
22 that is well beyond the jurisdictional limits
23 of this court.

24 And then we'll turn to the



1 Debtors' business. I have no doubt that the
2 Debtors wanted to get their DIP approved,
3 wanted to get the sale done, and said, hey, if
4 we can get rid of some objections, we'll take
5 it. And the testimony was that's what
6 happened. That, frankly, the term sheet as
7 written, even though the Debtors have a
8 sophisticated director, they didn't even
9 recognize that one of the things he testified
10 was so key to him that he wanted to keep those
11 actions, that the term sheet that he was
12 agreeing to actually contemplated that the
13 estate would keep those actions. But instead,
14 he thought, no, I'm not keeping those, so it's
15 not fair, but I'm going to approve it anyway.

16 And the Debtors had a rushed
17 process, which they admitted, they never heard
18 of this structure before the morning of the
19 hearing, had no idea this was coming to them,
20 they got a term sheet, said we have a hearing,
21 even though we've adjourned the DIP, even
22 though there's no testimony that there would
23 actually be harm in delaying the hearing by
24 any time, that, well, you know what, let's



1 just take it, we'll get one objection out of
2 the way and we'll deal with it later. And
3 that frankly is not an exercise of sound
4 business judgment. Yes, the standard --
5 assuming the settlement actually complies with
6 law, which we argue we don't believe it does,
7 we don't disagree with them on the 9019
8 standards, although we'll talk about Martin
9 factors in a moment. But this does have to be
10 an exercise of sound business judgment. And a
11 rushed judgment where the Debtors had a take
12 it or leave it proposal that they didn't even
13 have time to understand or read what was in
14 it, didn't negotiate one iota, and just took
15 it, that does not meet the standard of an
16 exercise of their sound business judgment.

17 And one of the things I started
18 with in my opening, your Honor, was the fact
19 that this wasn't sold. There were no claims
20 and causes of action that were actually being
21 sold. There was a reservation of rights that
22 had been filed , and when we have all the
23 pleadings that we discuss this our brief, the
24 Committee had stood up and said, okay, we're



1 okay on the sale. The Committee told the
2 Court that the sale produced the highest and
3 best value. As the Committee acknowledged,
4 all of their claims against the noteholders
5 had been waived. The noteholders had under
6 the terms of the DIP order valid binding liens
7 that were not subject to challenge by anyone.
8 So they had liens on all of the assets, there
9 were no claims left by the Committee. So what
10 we have here, as I said before, this isn't a
11 settlement. They would love to use the 9019
12 standard, but this isn't a settlement. What
13 they're effectively trying to do is create in
14 essence a Chapter 11 plan but have it blessed
15 under a 9019 standard because they could never
16 comply with the standards for approval of
17 anything with any greater scrutiny.

18 And your Honor, there are
19 standards that courts in this district, as
20 your Honor knows very well, there are
21 standards that need to be looked at when
22 approving a 9019. And they didn't even bother
23 to put on a case to show that they satisfied
24 the Martin factors. They said, well, we had



1 the DIP objection, we had a sale objection,
2 that should be sufficient. No evidence, no
3 testimony by either their Committee witness or
4 the Debtors' witness as to the viability of
5 those claims, whether they thought there was
6 any likes to those claims. In fact, we heard
7 the opposite; they just wanted to be done with
8 as many objections as they could.

9 Likely you heard of difficulty
10 in collection and complexity of litigation.
11 It was a DIP objection at most and a sale
12 objection; certainly not anything complex.

13 Then that takes us to the
14 paramount interest of creditors. And the
15 paramount interest of creditors, when you look
16 at the disparate treatment that's here, it
17 certainly is not in the paramount interest of
18 creditors. For a creditors' committee who now
19 spends a lot of time trying to dig up cases to
20 prove that they don't have fiduciary duties to
21 those people with whom they are actually
22 harming by this settlement is astounding. In
23 fact, if you listen to the argument, it was we
24 think we don't have fiduciary duties to the



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1 DDTL parties' deficiency claims well, because
2 they were represented by counsel, they were
3 active in this case, and since they were
4 active, they didn't need to worry about them
5 so we could ignore our fiduciary duty. And
6 that darn IRS, they just sat quiet the whole
7 time. They could have spoken up. They never
8 spoke up and they were silent the whole time,
9 so we didn't need to deal with them at all.
10 So somehow they don't have duties to you if
11 you're active in the case, they don't have
12 duties to you if you're silent in the case.

13 And what the record shows that
14 the documentary evidence shows, that it is the
15 Committee itself, not the purchaser, that
16 changed the term sheet and changed it to carve
17 out the priority claimants and to carve out
18 the deficiency claims. I understand why
19 they're worried about breaching their
20 fiduciary duty and why they're very worried to
21 try to point out case law to say, gee, we
22 didn't breach our fiduciary duties. But for
23 them to sit here and for a creditors'
24 committee to be an architect of a priority



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1 violating scheme that discriminates against
2 unsecured creditors to whom they owe a
3 fiduciary duty is pretty outstanding. And for
4 the argument to be that somehow that satisfies
5 the Martin factors that's in the paramount
6 interest of creditors to approve such a
7 scheme, frankly, it just doesn't make sense
8 even arguing it.

9 So in conclusion, your Honor,
10 the settlement motion has to be denied. This
11 is not a difficult case. Even if we were to
12 agree with them that Jevic applies only to
13 estate assets, there clearly is involvement of
14 estate assets here, and this is clearly tied
15 in instrumentally to the estate. They just
16 failed to exercise any modicum of business
17 judgement. They failed to satisfy their
18 burden under 9019. And as I started and as
19 I'm going to end, your Honor, this is
20 something that they created. The term sheet
21 that's in the record that the noteholders
22 proposed from day one, more than a month
23 before this settlement was reached, said pull
24 out a treatment, everybody can get it. And



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1 also said certain assets would come into the
2 estate. The Committee and of perhaps the
3 Debtors' counsel for whatever reason decided,
4 no, we want to be Smarter, we want to make
5 sure it never comes into the estate so we want
6 to remove that, and we want to take all of
7 this for those people who are on the
8 Creditors' Committee. That was their choice,
9 your Honor, and unfortunately for them, by
10 controlling case law, the settlement must be
11 denied. Thank you, your Honor.

12 THE COURT: Thank you,
13 Mr. Kaplan.

14 Ms. Casey?

15 MS. CASEY: Good afternoon
16 again, your Honor; Linda Casey for the United
17 States Trustee.

18 Your Honor, the Committee and
19 the Debtors are urging an overly simplified
20 analysis of whether this court can approve the
21 settlement agreement. They argue that the
22 Third Circuit's ICL decision remains binding
23 Third Circuit precedent that this court must
24 apply full stop, and because the assets are



1 purportedly not estate assets today, then the
2 settlement should be approved.

3 This is overly simplistic in two
4 ways. First, while it is true that the Jevic
5 decision directly dealt with an end of case
6 distribution of admittedly estate assets, it
7 did not specifically address whether
8 consideration paid to objecting parties in
9 order to obtain the Debtors' assets through a
10 363 sale could be classified as anything other
11 than estate assets. And a comprehensive
12 analysis of the Jevic decision demonstrates
13 that ICL's holding cannot survive.

14 In short, the potentially
15 serious consequences that the Supreme Court
16 sought to avoid by refusing to adopt a rare
17 case exception to an end of case priority
18 skipping distribution scheme will be present
19 if the fiction of non-estate assets continues
20 as a viable means of structuring an end of
21 case priority skipping distribution in the
22 context of a case involving a 363 sale.

23 The second way that the
24 Committee and the Debtors overly simplified



1 this analysis is even if ICL remains good law,
2 they urge the determining whether the
3 settlement proceeds can constitute assets of
4 the estate must be determined as of today,
5 wholly ignoring that as of the date the
6 settlement agreement was entered into, the
7 majority of the considerations should be
8 provided were clearly estate assets. The
9 willingness of the Committee to provides its
10 quid pro quo, withdraw of its objections and
11 the entry of the orders prior to approval of
12 the settlement does not alter the fact that
13 the parties negotiated and settled upon
14 ultimately class-skipping distributions of
15 estate assets.

16 So we start with the first step
17 in analyzing whether the settlement agreement
18 can be approved by looking at the Jevic
19 decision. The Committee urges this court to
20 adopt its narrowest possible holding, that
21 only end of case priority skipping
22 distributions of estate assets are prohibited.
23 Those were the facts in Jevic. The
24 distribution was an end of case distribution,



1 and the assets to be distributed were with no
2 objection estate assets. But Jevic cannot be
3 read so narrowly on either port. The Jevic
4 decision does not authorize any and all
5 distribution of estate assets, but rather sets
6 forth the test to determine whether any
7 proposed interim class-skipping distribution
8 is appropriate. The Supreme Court stated that
9 an interim distribution of estate assets in
10 violation of the code's priority scheme must
11 have a significant offsetting bankruptcy
12 related justification, setting forth several
13 examples, including preserving the Debtor as a
14 going concern, or promoting the possibility of
15 a confirmable plan.

16 Courts applying Jevic cannot
17 simply ignore those injunctions and say, well,
18 the Supreme Court only discussed end of case
19 distributions, and therefore, all interim
20 distributions are appropriate. Rather, they
21 must apply Jevic's rationale and look at all
22 interim distributions to see if there is, in
23 fact, a significant offsetting bankruptcy
24 related justification before permitting it.



1 And that same principle applies
2 here whether determining that their
3 justification that there's this fiction of
4 non-estate assets continues to survive Jevic.
5 The Supreme Court specifically addressed
6 whether to create a rare case exception to an
7 end of case priority skipping distribution
8 scheme. It declined to do so. Its reasoning
9 in declining such an exception must be
10 reviewed and analyzed. The Supreme Court
11 noted that if a rare case exception were
12 permitted, the fact that it is difficult to
13 give precise content to the concept of
14 sufficient reasons, would turn the exception
15 into a general rule resulting in uncertainty.
16 This uncertainty, in turn, would result in
17 consequences that would be potentially
18 serious. These serious consequences include
19 the departure from the protections Congress
20 granted particular class of creditors; changes
21 in bargaining power of different classes of
22 creditors, even in bankruptcies that do not
23 end in structured dismissals; risk of
24 collusion where high priority creditors and



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1 low priority creditors team up to squeeze out
2 mid priority creditors; and making a
3 settlement more difficult to achieve.

4 The Supreme Court specifically
5 noted the importance of clarity and
6 predictability in light of the fact the
7 Bankruptcy Code standardizes an expansive and
8 sometimes unruly area of law, and concluded
9 that the Court cannot alter the balance struck
10 by the statute.

11 Today we are faced with a
12 different exception to the prohibition of end
13 of case class-skipping distributions, and that
14 is that such distributions are not estate
15 assets. Resting upon a Third Circuit decision
16 that rejected the notion that a payment
17 directly from the purchaser of the Debtors'
18 offers' assets to an objecting party
19 constituted proceeds of the property of the
20 estate.

21 So what we are really faced with
22 here today is deciding whether ICL's holding
23 can survive Jevic is the following question:
24 Can Jevic be read so narrowly as to create a



1 rush to the courthouse by individual
2 creditors, an official or ad hoc committee of
3 creditors, perhaps even equity holders or ad
4 hoc committees of equity holders, seeking
5 their share of the side deals or gifts offered
6 by the purchaser of the Debtors' assets?

7 To continue the holding of ICL
8 that allows this fiction of non-estate assets
9 is to adopt a fiction that creates the same
10 uncertainty that the Supreme Court's decision
11 in Jevic was designed to address. Here my
12 argument was going to go on simply with the
13 facts of Jevic. We have, however, a record
14 now established that shows the exact harm that
15 the Supreme Court was addressing. And your
16 Honor, I would posit that we have that record
17 today, because as the Committee and the
18 Debtors have argued, they weren't trying
19 necessarily to get around Jevic, they were
20 trying to get an opinion with the Third
21 Circuit's decision. And perhaps in future
22 cases we won't have quite the same record,
23 because lawyers will know to dot their I's and
24 cross their T's a little bit better to not



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1 have a record so clearly show the harms that
2 the Supreme Court was trying to address.

3 But here what we have is the
4 same situation. It is difficult to give
5 precise content to the concept of what is
6 non-estate assets when discussing a sale of
7 the Debtors' assets through a 363 sale. It
8 creates uncertainty. How much is the
9 purchaser willing to gift to rid itself of the
10 objections? Who is the purchaser willing to
11 gift to? How will the purchaser permit such
12 gift to be distributed?

13 This exception would incentivize
14 future stalking horse bidders and even other
15 bidders at the auction to hold back part of
16 their consideration they would otherwise be
17 willing to pay to ensure that funds would
18 still be available for it to pay objecting
19 parties, thus further depressing the
20 liquidation value of assets already in
21 bankruptcy.

22 And how does the fiction
23 permitting the ICL fiction to continue despite
24 the Supreme Court's admonition result in the



1 harm? The first is the departure from
2 protections Congress granted particular
3 classes of creditors. In Jevic, they talked
4 about the fact that Congress established
5 employee party to alleviate the hardships
6 employees face when their employers file
7 bankruptcy and to encourage employees not to
8 abandon ship. Permitting the major parties in
9 a case to structure a sale such that the
10 transfer of consideration goes to some
11 individual creditors rather than the estate,
12 and therefore deeming that structure to create
13 non-estate assets results in that harm.

14 The record here demonstrates
15 that harm. The record here, the Committee and
16 the purchaser negotiated a payment to certain
17 unsecured creditors while not protecting
18 priority creditors. In fact, what we see here
19 is an email from Committee counsel
20 specifically providing that the priority
21 creditors will not even be able to participate
22 in a pro rata distribution of the assets to
23 the GUC trust. And certainly not protecting
24 the code balance that gives them priority over



1 everybody else.

2 This also has the second harm of
3 Jevic, changes in bargaining power of
4 different classes of creditor, even in
5 bankruptcies that do not end in structured
6 dismissals. Continuing the fiction that money
7 is paid to overcome objections to sales are
8 not considerations paid by the purchaser to
9 obtain the assets, shifts the balance struck
10 by the statute, and grants all creditors and
11 all equity holders an equal chance to obtain a
12 payment, as long as it directly comes from the
13 purchaser, altering the code's balance and
14 changing the bargaining power.

15 Here, again, we have testimony
16 that priority creditors and the deficiency
17 claims of the disfavored unsecured creditors
18 were excluded in a manner that appears not to
19 be directed by the owner of the assets
20 allegedly being contributed but by the
21 Committee.

22 We also have here the third harm
23 that Jevic addressed, risks of collusion,
24 where high priority creditors and low priority



1 creditor teams team up to squeeze out mid
2 priority creditors. Sophisticated,
3 well-funded parties, major unsecured
4 creditors, large equity holders committees,
5 can use this non-estate assets fiction
6 exception to 363 sales to force a bargain with
7 a purchaser where the deal is structured in a
8 way that mid priority creditors are squeezed
9 out.

10 Query, would the Court shall
11 comfortable to approve this same settlement if
12 the settling party were not the Committee but
13 were rather than ad hoc group of equity
14 holders, squeezing out not just priority and
15 administrative creditors, but also unsecured
16 creditors, all with the fiction that, well,
17 it's not estate assets anyway.

18 The record here shows an attempt
19 to structure this settlement to exclude
20 certain estate assets from the estate prior to
21 contributing it to the GUC trust. We don't
22 really know why. The DDTL parties have
23 indicated that perhaps it's to get around
24 Jevic. That may be the case. It may be the



1 case to get around a Martin valuation, with a
2 valuation of the settlement -- excuse me, the
3 specified causes of action might be too great
4 compared to the benefit received by the estate
5 for the release of the Committee's objections.

6 But we see that attempt. We see
7 the attempt to take assets that belong to the
8 estate and find a structure where it can come
9 into this court and say it's no longer an
10 asset to the estate, and now it can go to the
11 preferred creditors and skip over the
12 unpreferred creditors.

13 We also have a situation here
14 where you not only have the priority creditors
15 and the admin creditors not being invited to
16 participate in this distribution, but you have
17 fully unsecured secured lenders, clearly a
18 disfavored, probably a very large claim that
19 would swamp the unsecured creditors, and
20 they're kicked out of this distribution.

21 And finally, we have the last
22 harm that the Supreme Court tried to address,
23 which was making a settlement more difficult
24 to achieve. If all parties know the playing



1 field and any money paid to acquire the assets
2 of the Debtors is proceeds and estate
3 property, then all parties will be invited to
4 the settlement table, and a global resolution
5 is more likely to result. If on the other
6 hand all parties know that, structured
7 correctly, any money paid by the purchaser
8 could go directly to any creditor, settlement
9 will be more difficult to achieve, and there
10 will be a free for all to be the one that the
11 purchaser deems worthy enough of the separate
12 side deal.

13 The Jevic court did not close
14 the window on end of case priority-skipping
15 distributions, but leaves the barn door wide
16 open to permit creative lawyers to craft
17 individual solutions that transfer estate
18 property into purportedly non-estate property,
19 resulting in the very harm that the Supreme
20 Court was addressing. ICL's blessing of the
21 fiction that consideration paid directly to a
22 creditor to obtain the Debtors' assets without
23 objection is not proceeds of the Debtors'
24 property cannot survive the Jevic decision.



1 It is also worth to know that
2 the procedures here, the settlement
3 procedures, as your Honor said, we cannot look
4 at this in a vacuum, the settlement procedures
5 that are proposed by the Committee go far
6 beyond anything in Jevic and go far beyond
7 anything that the code or the bankruptcy rules
8 provide. I do have specific objections, and
9 if we get to that point where we have to
10 discuss it, I'll go through them. But in
11 general, the Bankruptcy Code and the rules are
12 flipped on their head. There's no right to
13 take discovery, no right to even provide
14 testimony supporting the claim, binding claims
15 mediation where the claimant has to pay half
16 of the mediation. None of these are in the
17 code, and the entire scheme is just basically
18 saying, as long as there aren't estate assets
19 or as long as this court adopts the fiction
20 that these are not estate assets, we then can
21 just ignore the entirety of the code and the
22 rules and put whatever in place makes sense.

23 We also heard something very
24 telling in the Committee's argument today.



1 The Committee said if you disapprove this,
2 then the purchaser will have received a
3 multi-million dollar windfall. That would not
4 be fair. That, your Honor, is exactly what
5 the argument is. This is not a gift, it is
6 not a side deal, it is the purchase of the
7 assets, and that payment came in as
8 consideration to be able to get those assets.
9 And the Committee admitted it. If you
10 disapprove of this, they've received the
11 windfall without paying everything they agreed
12 to pay to get those assets.

13 The Committee also warned your
14 Honor that if you disapprove this, it will
15 reverberate across the nation and prevent
16 committees in future cases from being able to
17 enter into settlements. But your Honor, it
18 will not be your decision that will
19 reverberate across the nation, it is the
20 Supreme Court's decision. The Supreme Court
21 specifically said that the importance of
22 clarity and predictability in light of the
23 fact that the Bankruptcy Code standardizes an
24 expansive and sometimes unruly area of law



1 resulted in the Supreme Court saying it cannot
2 alter the balance of the code. Right here,
3 the balance of the code is unsecured creditors
4 cannot get paid out of estate assets until all
5 senior creditors are paid in full. And if
6 that makes it more difficult for a Committee
7 to enter into an agreement with this fiction
8 of a side deal, the fiction of non-estate
9 assets, and forces them to comply with the
10 Bankruptcy Code, that's what the Supreme Court
11 said in Jevic.

12 As such, the settlement
13 agreement here cannot be approved as it does
14 skip higher priority claims, discriminates
15 against disfavored unsecured creditors, and
16 the fiction that it is all done by non-estate
17 assets cannot be continued post Jevic.

18 However, even if your Honor
19 determines that ICL does continue to have
20 viability, it does not shield the settlement
21 agreement in this case. And despite what the
22 creditors' Committee stated in their argument
23 today, there is a dispute as to whether the
24 assets are estate assets. There are at least



1 four distinguishing factors. First, the
2 Debtors and the Committee are providing mutual
3 releases. The Debtor in ICL were not
4 providing any releases. But here, as the DDTL
5 parties already pointed out, these releases
6 are broader than the releases that were
7 contained -- or excuse me, than the
8 stipulations and waivers contained in the
9 final DIP order, and they are also the
10 Committee's releases, as well, which of course
11 they're releasing estate causes of action.
12 This is clearly estate property, and anything
13 received in exchange for the Debtors'
14 releases, the Debtors' broader releases than
15 the final DIP order, the Committee's broader
16 releases than the final DIP order, are estate
17 assets.

18 Second, the settlement releases
19 the Committee's right to pursue claims against
20 the secured lenders which claims are estate
21 causes of action. The Committee hangs its hat
22 now on the fact that the challenge periods set
23 in the interim order expired, the final order
24 had not been entered as of the date of this



1 settlement.

2 Third, the settlement provides
3 an increased payment to the secured lender to
4 pay professional fees. And in this respect,
5 we need to look at the settlement agreement
6 which specifically provides how those
7 increased funds are going to come to the
8 Committee. And that is the Committee's
9 professional fees shall be paid solely through
10 the wind-down budget and the applicable amount
11 of seller retained third party professional
12 fees, i.e. Debtor retained third party fees,
13 included in the wind-down budget. And section
14 3.1 A-2 of the APA shall be amended to reflect
15 the updated total amount of seller, i.e.,
16 Debtor retained third party professional fees
17 or the wind-down budget. So this is being
18 paid by the Debtor, according to the terms of
19 the settlement sheet. In their papers, they
20 argue that, well, final DIP order was already
21 approved, the escrow was already funded, the
22 fee applications have been approved, we've
23 been paid, there's no Debtors' assets being
24 transferred in this. But clearly that's not



1 true. At the time of the settlement, none of
2 that had occurred, and the quid pro quo was
3 the favor of the DIP objection to allow the
4 DIP order to be entered, to allow that money
5 to be funded, and therefore, at the time the
6 settlement was entered into, it was clearly
7 estate assets.

8 There's also an issue the
9 Committee says, well, it's not priority
10 skipping because we're admin creditors, we
11 have to be paid. As your Honor indicated, you
12 have to look at this case in its totality, and
13 in the case in its totality, we are currently
14 administratively an insolvent estate; we have
15 the WARN act creditors establishing a record
16 that there's a possibility that their admin
17 claims have not been appropriately reserved
18 for, and that they might not be paid in full.
19 So therefore, you can't just say, well,
20 because we are admin creditors, there's no
21 priority skipping. There are other admin
22 creditors here who are not being paid.

23 Finally, there is the transfer
24 here of estate causes of action again



1 purportedly sold to the purchaser and then
2 transferred to the GUC trust. ICL did not
3 address whether this indirect transfer of
4 estate assets could be deemed to be a transfer
5 of non-estate assets, and it's clear it should
6 not be. Again, at the time the settlement was
7 entered into, not today, they were estate
8 assets. The sale had not closed, the sale had
9 not been approved. At the time that the
10 Committee and the noteholders were negotiating
11 over whether the Committee should be able
12 to -- excuse me, the GUC trust should be able
13 to get these causes of action, they were
14 estate causes of action.

15 They became non-estate causes of
16 action, arguably, when the Committee agreed to
17 withdraw its objection and let the sale order
18 be entered. But at the time of the
19 settlement, they were clearly undeniably
20 estate causes of action. They may come back
21 and say, your Honor, we had testimony that the
22 Debtor tried to get them to not be included in
23 the APA and worked hard not to get them into
24 the APA and they were into the APA. The APA



1 was not approved. At the time they entered
2 into the settlement, the APA was subject to
3 objection, had not been approved, the cause of
4 action were clearly estate causes of action.
5 Thus, even if ICL does remain good law, the
6 assets transferred pursuant to the settlement
7 cannot be deemed to be non-estate assets, and
8 the settlement cannot be approved.

9 I do have one technical point.
10 If your Honor were inclined to approve the
11 settlement agreement, the settlement agreement
12 provides that the Debtors and the Committee
13 will not object to fee applications brought by
14 any of the parties' professionals. There is a
15 fiduciary out so that the Debtors and the
16 Committee can meet their fiduciary obligations
17 to review and object to fee statements of
18 estate professionals. But, of course, the
19 parties include the DIP lender and the
20 purchaser, and therefore, their professionals,
21 they're not estate professionals, and the
22 fiduciary out in the settlement agreement does
23 not extend to that. And if your Honor were to
24 approve the settlement agreement , we do



1 object to the provision that says that the
2 Committee and the Debtors agree not to object
3 to the fee statements of the DIP lenders or
4 the purchasers' agreements -- excuse me,
5 professionals.

6 I do have specific objections to
7 the procedures motion. I don't know if your
8 Honor would like me to go through it now. I
9 don't believe that that's where we are; I
10 think we're waiting --

11 THE COURT: Yeah, let's wait on
12 that.

13 MS. CASEY: If your Honor
14 doesn't have any further questions, that's
15 all.

16 THE COURT: I don't. Thank you.
17 We're going to take a short
18 recess, then I'll hear the next set of
19 objectors, so about five minutes.

20 (A brief recess was taken.)

21 THE COURT: Next? Mr. Raisner?

22 MR. RAISNER: Thank you, your
23 Honor. Good afternoon. Jack Raisner on
24 behalf of the WARN class.



1 Your Honor, the Jevic court did
2 rule that in a case ending distribution by an
3 estate, the priority code must be followed.
4 It is true that the distinction between estate
5 and non-estate assets were by that point a
6 non-issue, and that's because the appellees
7 rendered itself by not pursuing that argument
8 rather early in the appeal process,
9 recognizing it as a non-starter.

10 And Mr. Kaplan and Ms. Casey did
11 an excellent job of showing how intertwined
12 the distributed assets were to the estate that
13 differentiated from ICL. The argument we did
14 not attend that afternoon in the Third
15 Circuit. So I'm not going to argue those
16 differences.

17 But I would like to make one
18 point that I think might have been lost and
19 may not even have surfaced in the Jevic
20 opinion, but is important here. And that is
21 that when the assets are being used by the
22 Debtor, they are not just serving as a
23 messenger agent for the secured lender as a
24 passive intermediary, taking the money from



1 the lender and giving it to the creditors in
2 their pockets. They're using the money to
3 settle claims against the estate which are
4 claims against the Debtor itself. The Debtor
5 is playing the role of a self-interested
6 agent, in agency principles, being such an
7 agent is liable personally. And when the
8 Debtor is using the money as it does here, to
9 extinguish claims against it from creditors,
10 then it is liable to have to follow due
11 process and the Bankruptcy Code. And that is
12 a way to, again, differentiate ICL in which
13 this didn't happen, but it's compelling I
14 think in light of the procedures here that
15 were proposed in the dismissal motion for the
16 non-WARN CSC employee claimants. Their claims
17 were supposedly going to be, are going to be
18 sent to them in the form of a notice saying
19 that they're allowed certain amount of money,
20 and they will have 14 days from receipt in
21 order to object to that with particularity and
22 with documentation if they want to preserve
23 their claim. And if they don't respond in the
24 14 days, in the event that the Debtors do not



1 receive a timely claim objection to the
2 proposed disbursement notice, the Debtors may
3 make the appropriate distribution from the CSC
4 employee reserve in full and final
5 satisfaction of the related non-WARN CSC
6 employee claims.

7 So what they are doing is
8 setting up a system to extinguish claims as
9 they see fit with the amount of money that the
10 Debtor sees fit. And that is the finality of
11 taking away of someone's claim which is a due
12 process issue that I do think that the Jevic
13 decision does recognize. And you hear certain
14 bankruptcy lawyers saying that after Jevic,
15 they didn't realize that the Constitution
16 played such a part under the Bankruptcy Code.
17 So there is that, your Honor.

18 But I'd like to focus then on
19 the other side of Jevic and what the Supreme
20 Court did and what was supposed to be done,
21 and that is to make priority skipping final
22 distributions, of course, but with consent.
23 And the motivation to reach consent is to have
24 a dialog, to have some sort of settlement with



1 those priority claimants so that there's a
2 basis for reaching consent. Here there was, I
3 think, a purpose of putting certain amount of
4 money into an escrow which was going to induce
5 some kind of resolution of claims, both the
6 Jevic -- I'm sorry, the WARN claim and also
7 the non-WARN claims.

8 The problem here is that the
9 procedures are hollow. Our concern at the
10 outset was that we didn't have information.
11 And so we lodged our first objection based on
12 that alone, and then as we found it harder and
13 harder to pull out any details or terms
14 regarding this amount of four-and-a-half
15 million dollars roughly, it turned out it was
16 hard, because there was no there there. There
17 are no terms. There is nothing to stake that
18 money in the ground with certainty such that
19 one can even talk about settling no less
20 relinquishing an objection to the fact that
21 the estate is trying to get out of bankruptcy
22 with no provision to pay priority claims in
23 full.

24 But there's an opportunity when



1 there is supposedly \$4.6 million to reach a
2 settlement, to reach a consensual resolution.
3 And that's a missed opportunity here.

4 Our objections were raised and
5 they were not responded to in the most recent
6 reply by the Debtor and Committee, and the
7 Debtor and Committee has put on no case
8 whatsoever to show that there is any there
9 there to this supposed \$4.6 million. So to
10 say they don't understand why we're here
11 rebuffing us the way they have done from day
12 one, what are you worrying about? There is
13 this one here for you. That would be
14 wonderful. And get to go a resolution and
15 settlement includes, however, a proportionate
16 responsibility on our part to kick the tires,
17 do the due diligence, and keep litigating
18 until we see there's been some there there,
19 and there has been no case put on that there
20 is any.

21 So it does seem as though there
22 was an awareness that in order to, quote, get
23 around Jevic in order to try to at least
24 create the possibility or illusion of a



1 consensual settlement, something was done to
2 put some rules, a few sentences down in some
3 orders. But it unfortunately turns out to be
4 a losery, that the 4.6 million would even used
5 to pay employees is suspect, because the first
6 sentence of the sale order of August 19th, the
7 very first sentence leaves an open-ended,
8 ambiguous clause as to what the money might
9 even be used for. I'll just read it into the
10 record. "The ad hoc notes and Creditors
11 Committee, PE and CE, GSPEO, and the DIP
12 lenders, the creditor parties, agree funds
13 will be set aside (in an escrow or other
14 acceptable manner) the employee funding escrow
15 from the net proceeds from the sale in an
16 amount sufficient to pay the estimated amount
17 of all allowed security priority and
18 administrative claims of the employees of CSC,
19 whether they're working or not, or such other
20 amounts as may be agreed upon." The money of
21 the proceeds may be set aside to pay other
22 amounts as may be agreed upon. That's
23 completely open-ended.

24 And of course when we first read



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1 it, we didn't know what that means, and we
2 tried to fathom it. But as you can see from
3 the testimony today, nobody knows what will
4 ultimately be the agreed upon use of whatever
5 money has been in some way segregated. And so
6 there is a -- there was a sense in Jevic that
7 the one plaintiffs were offered something and
8 they didn't take it, and their recalcitrant or
9 the step up artists or something, and
10 unfortunately here, there's an idea that
11 somehow we're looking a gift horse in the
12 mouth. But if the result of whatever the
13 Court's disposition is would be to have some
14 certainty placed in the use of these funds
15 that have been used in this settlement so that
16 a constructive settlement can be talked about
17 and perhaps reached, that should be the way
18 cases end in a final distribution, not with
19 terms thrown at creditors and then close the
20 doors and ears and come into court and say we
21 can't do anything else about this. That is
22 not the best practice. Thank you, your Honor.

23 THE COURT: You're welcome.

24 Mr. Benson?



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1 MR. BENSON: Thank you, your
2 Honor. Just a few brief points. I know we're
3 not currently discussing objections to the
4 mechanics motion as it's called, but I want to
5 direct the Court's attention to two provisions
6 of the liquidating trust agreement, because I
7 think they're directly relevant to the issue
8 of just jurisdiction over the settlement.

9 I first note in the liquidating
10 trust agreement Section 2.2 H, which entitles
11 the liquidating trustee to seek a
12 determination of tax liability or refund under
13 section 505 of the Bankruptcy Code. 10.6
14 entitles the trust to request an expedited
15 determination of taxes and tax refunds, tax
16 refund rights, excuse me, of the CE
17 liquidating trust, including the disputed
18 reserves under section 505 B of the Bankruptcy
19 Code for all the terms or claims filed by the
20 CE liquidating trust for all taxable periods
21 through the determination of the CE
22 liquidating trust.

23 Now, section 505, the broad
24 granted jurisdiction to bankruptcy courts to



1 determine tax liability has been limited by
2 the Third Circuit in the Qualcomm case to tax
3 liabilities of the Debtor or the estate for
4 the most part unless, very rare circumstances,
5 it says, but generally 1334 says you have to
6 have related jurisdiction. If the liability
7 is not of the Debtor or the estate, it's
8 unclear how that relates to administration of
9 an estate, and therefore, as a general matter,
10 there can be no jurisdiction for the
11 liquidating trust, or no jurisdiction over tax
12 liabilities of the liquidating trust unless it
13 is, in fact, the estate. Same holds true for
14 the expedited determination request under 505
15 B under the code. That procedure is only
16 available to determine liabilities of the
17 estate.

18 Now, exceptions are made
19 sometimes when you have liquidating trust that
20 is deemed to be a de facto successor to the
21 estate. But that is only where you have a
22 liquidating trust that is administering the
23 estate assets. So here, in order for the
24 Court to have the jurisdiction that is being



1 sought under the liquidating trust agreement,
2 the liquidating trust must be a de facto
3 successor to the estate, meaning it must be
4 administering estate assets. If that's true,
5 then there's a Jevic problem. If the
6 liquidating trust has no estate assets, it is
7 not a successor to the estate, then there's no
8 jurisdiction, and we continue our objection to
9 the liquidating trust.

10 Moving on, I'd just like to
11 respond to Mr. Kinel's comment about how the
12 United States and the IRS were not involved up
13 until very recently. We weren't involved
14 because as far as I know, no one at the tax
15 division or the IRS was alerted that any of
16 this was happening. We do not have the
17 resources to have the DOJ attorney attend ever
18 sale hearing and DIP hearing and hearing of
19 any kind to make sure that there is no
20 settlement put in place that affects us down
21 the line and cuts out our priority claim.
22 It's just totally unrealistic, it's
23 unrealistic to all other priority claims,
24 employee claims when not represented by class



1 counsel. And that also goes to what the
2 Supreme Court was saying about the whole
3 importance of priority, is it forces the
4 insiders to the case to bring in the con
5 congressionally preferred priority creditors.
6 Because if the priority doesn't matter, then
7 there's no reason to bring us in, we don't
8 find out until it's essentially a fait
9 accompli, or patricide, as Mr. Kaplan
10 described it.

11 So for that reason, I think it's
12 very important, however you want to talk about
13 it, as ICL, Jevic, the priority claims need to
14 be given their congressionally granted status
15 if we're ever to be brought in and allowed to
16 participate in these negotiations, which the
17 Supreme Court highlighted as the crucial part
18 of its Jevic decision.

19 THE COURT: Thank you,
20 Mr. Benson. Reply?

21 MR. SHAPIRO: I'd like to
22 respond to just a few points raised by the
23 parties.

24 First, I'd like to address the



1 allegation that the Debtors did not exercise
2 sound business judgment in agreeing to enter
3 into a settlement. So I think, again, the
4 context here is important in what was put in
5 front of the Debtors. And specifically, what
6 was put in front of the Debtors were the
7 following terms. The purchaser would
8 contribute causes of action that it purchased
9 to a GUC trust. The purchaser would
10 contribute its own cash to the GUC trust.
11 Certain out of money creditors would be the
12 beneficiaries of those assets, and the
13 Committee would support the sales and the debt
14 and drop any objections there to.

15 And importantly, that document
16 on August 16th was subject to further
17 documentation. And I have a couple -- in case
18 that wasn't clear, I have a few quotes from
19 the August 16th hearing from each of the
20 parties. First was Mr. Rubin, counsel to the
21 ad hoc Committee. And there Mr. Rubin said,
22 "The Debtors are not today committing to these
23 things. We know we have steps to take to get
24 there. The Debtors are supportive of the



1 terms." Mr. Wehrer, counsel to the Committee:
2 "There are certain elements regarding process
3 that we need to work through." And finally,
4 Mr. Rogoff, counsel to the Debtors: "The
5 Debtors are prepared and committed to work in
6 good faith with them, and the other parties
7 memorialized this agreement.

8 And then if you wanted to look
9 at what happened with the benefit of hindsight
10 when determining whether the Debtors exercised
11 sound business judgment, the Court did, in
12 fact, approve the sales on August 16th and the
13 DIP on September 9th. So in other words, the
14 Debtors' key goals were achieved, and the
15 Debtors gave up nothing in the process. And
16 in the reasonable view of the Debtors, the
17 Committee support helped achieve those goals.

18 And it can't simply be the case
19 that in order to enter into a settlement, all
20 parties must be treated fairly. That simply
21 can't be right. Why? Most importantly
22 because on August 16th and even on September
23 9th, there was a binding Third Circuit opinion
24 that was binding on this court that allowed



1 for class skipping in the context of
2 settlements. But at least in part what the
3 DDTL parties are saying is that the Debtors
4 couldn't have possibly signed on to the
5 settlement the same day that it received it.
6 That's just not enough time to digest the
7 document and make a determination as to
8 whether to enter into it subject to final
9 documentation. To me that sounds like an
10 argument that the Debtors breached some kind
11 of duty of care.

12 But let's assume that underlying
13 premise is true and a few hours isn't enough
14 time to review and understand a six-page
15 document. Fine. But what about three weeks?
16 Because it was not until September 8, more
17 than three weeks later, that the settlement
18 term sheet was finalized, executed, and filed
19 with this court. Three weeks is surely enough
20 time to review and understand a six-page
21 document.

22 Now, let's just talk about why
23 it was important to have the sale go forward
24 on August 16th and not adjourn it so that we



1 could get this settlement in a term that was
2 more fair to all the parties. And I think the
3 testimony there, uncontroverted, we needed an
4 approved sale to show the market, the vendors,
5 employees, et cetera, that we had a buyer and
6 that this business would survive. That surely
7 is a valid reason to move forward with a sale
8 on August 16th, not where standing that the
9 term sheet wasn't finalized and
10 notwithstanding that the term sheet didn't
11 make everybody happy.

12 And my next point speaks to the
13 allegation by the objectors, and really the
14 DDTL parties, that the settlement was some
15 kind of a laundering scheme that was the
16 result of some conspiracy between the Debtors
17 and the Committee. We found this particular
18 accusation offensive, especially given the use
19 of the word laundering, and that connotes some
20 kind of criminal conduct. But let's assume
21 the DDTL parties are right, we used the
22 purchaser to transfer state causes of action
23 to the trust to get around Jevic. But how
24 could that be laundering? How could that be



1 in any way criminal? As I noted, at the time
2 the settlement was entered into, the Third
3 Circuit's opinion in Jevic was binding. It
4 permitted class skipping in limited
5 circumstances. There could be nothing
6 criminal about what was done.

7 But let's talk about why that
8 allegation is nonsensical. From the outset of
9 these cases, the purchaser contemplated
10 acquiring what the settlement refers to as
11 specified causes of action. In fact, just
12 days after the petition date and before the
13 Committee was even formed, the Debtors filed a
14 term sheet on the Court's docket that provided
15 such causes of action were proposed to be
16 purchased assets. So in other words, this
17 so-called conspiracy began before the
18 Committee was even formed. Now, it's been a
19 while since I've taken criminal law, but my
20 recollection is much like the tango, a
21 conspiracy requires at least two parties.

22 But let's assume there was a
23 conspiracy. What would that conspiracy be?
24 Well, the Debtors and the Committee, before



1 the Committee was even formed, conspired to to
2 ensure that the purchaser acquire the
3 specified causes of action. The Debtors and
4 the Committee then conspired to get the
5 purchaser to agree to contribute those causes
6 of action to the GUC trust if and only if the
7 summit was approved with knowledge and
8 downright clairvoyance that the Supreme Court
9 would overrule the Third Circuit in Jevic. In
10 other words, we were really playing the long
11 game, and we were really coy if I dent that
12 this settlement would be approved. Because if
13 it isn't approved, these causes of action will
14 remain as they are today since November 28,
15 2016, with the purchaser. All criminal
16 conduct is risky, but this experience just
17 defies common sense.

18 In further support of their
19 experience theory, the DDTL parties point to
20 various drafts of the term sheet which they
21 say demonstrate we were manipulating the term
22 sheet to contravene Jevic. Let's assume
23 that's correct. Well, isn't that our job?
24 Isn't our job to comply with the law and to



1 structure transactions so they comply with the
2 law? We tried to structure the transaction in
3 such a way to remove any concern that to the
4 extent Jevic was implicated wouldn't be an
5 issue.

6 But getting past that, the only
7 item that changed of any relevance to the
8 issues before your Honor today was the precise
9 mechanic of how assets would be contributed.

10 THE COURT: Which is the entire
11 thrust of your current argument that Jevic
12 doesn't apply. So you dismiss it and rely on
13 it at the same time.

14 MR. SHAPIRO: So I only rely on
15 it inasmuch as on August 16th when the Debtors
16 made the determination to exercise sound
17 business judgment, at that time, Third Circuit
18 law permitted class skipping. That's the
19 extent I rely on it.

20 THE COURT: On August 16th, the
21 document your client approved had the causes
22 of action coming back to the Debtor, and then
23 you changed it.

24 MR. SHAPIRO: That's fair.



1 THE COURT: And you say it
2 doesn't matter that you changed it, but of
3 course it matters you changed it, because as
4 we sit here today, if you hadn't changed it,
5 you'd be DOA. That's my point.

6 MR. SHAPIRO: And that's a fair
7 point. But I think the record makes clear
8 both on August 16th at the transcript that
9 when Mr. Wehrer said that the mechanic was to
10 be worked out, and it was worked out. And on
11 September 8th when we filed the executed term
12 sheet, that was the mechanic that's before
13 your Honor, that was the ultimate mechanic
14 that was decided.

15 THE COURT: Who does Mr. Wehrer
16 represent?

17 MR. SHAPIRO: The Committee.

18 So getting back to the term
19 sheet, there was never a -- so before August
20 16th, we had an auction. And at that auction,
21 we declared the winning bidder for the non-CSC
22 assets. And the purchase agreement that we
23 filed with the Court, the one that we declared
24 the winning bid, provided that the CE Star



1 entity would acquire these specified causes of
2 action.

3 So from our perspective, on
4 August 15th up until the morning of August
5 16th, it was always our understanding that the
6 purchaser was acquiring these causes of
7 action, because that's what the APA that won
8 the auction provided for.

9 So that morning when we were
10 told that the APA was going to be amended so
11 that these causes of action could be
12 contributed to a trust, from our perspective,
13 in sound exercise of our business judgment, we
14 were never entitled to those causes of action
15 to begin with. We had already declared them
16 the winning bidder, and that bid contemplated
17 the purchase of those assets.

18 And the other thing that's
19 telling is --

20 THE COURT: But at that time,
21 they were still your assets.

22 MR. SHAPIRO: That's correct.
23 But the settlement that we entered no --
24 sorry. The settlement that we agreed in good



1 faith to pursue on August 16th was always
2 subject to court approval. A Debtor just
3 can't just enter into a settlement at that
4 time and have it be binding on him. It's
5 still not binding on him; it has to be
6 approved by your Honor.

7 So what happened between then is
8 the sale closed and the causes of action are
9 owned by the purchaser. And if the settlement
10 today is not approved, the causes of action
11 will still be owned by the purchaser.

12 THE COURT: Look, the problem
13 you have is that most of the arguments I'm
14 hearing from you and from Mr. Kinel are the
15 exact same arguments that Judge Shannon relied
16 on when he did the lower court ruling in
17 Jevic, okay? But that doesn't carry weight
18 anymore. The Supreme Court has made it very
19 clear that those kind of arguments and the
20 kind of arguments you're making right now,
21 that if I don't approve this transaction, this
22 money will go away and everybody will be worse
23 off. That was the exact rationale that was
24 overturned by the Supreme Court, and they say



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1 that has to fall to the wayside when you're
2 talking about altering the priority scheme
3 without some bankruptcy related purpose.
4 Right?

5 MR. SHAPIRO: That's true, your
6 Honor.

7 THE COURT: And that was the
8 thrust of Mr. Kinel's closing at the very end
9 was you can't do this to us. Well, I didn't
10 do it to you, eight people in Washington, D.C.
11 did it to you. Well six, I guess in washing
12 done D.C. did it to you, I didn't do it to
13 you.

14 MR. SHAPIRO: And I understand,
15 your Honor; that wasn't my argument. The only
16 point would make to that is what distinguishes
17 this case from other cases and perhaps that
18 case is right now what's being contributed if
19 this settlement is approved is coming from a
20 non-Debtor.

21 THE COURT: Yes and no, okay?
22 Yes, they currently have it after the closing.
23 No, it started off as a Debtor asset. This
24 isn't -- is it ICL? I'm no good with



1 acronyms.

2 MR. SHAPIRO: That's right.

3 THE COURT: This isn't ICL.

4 This isn't even Jevic to the extent we're
5 talking about the CIT cash distribution or the
6 lien contribution. In ICL, that was money
7 that was never in the estate's coffers that
8 was going from the purchaser to the creditor.

9 In this case, you start, the
10 very proposition on as of the petition date,
11 this was property of the estate. It's always
12 property of the estate. So say it's not
13 estate property that's being distributed is
14 ignoring its origins. And doesn't that
15 distinguish it from ICL because it started off
16 as state property?

17 And importantly, at the time the
18 settlement was reached on August 16th, and
19 even on September 8th, it still was property
20 of the estate.

21 MR. SHAPIRO: What I think
22 distinguishes that is they're not co-dependent
23 on one another. We're not saying that you
24 can't approve the sale unless the settlement



1 is approved. They really truly are two
2 independent things. Because right now, the
3 sale has closed, the sale has been approved,
4 and those assets belong with the buyer.
5 They're with the buyer. The only string
6 attached is if this settlement is approved, at
7 that point, it's transferred. But they're not
8 tied together. They're independent, and
9 that's the way that we required them to be.

10 So I don't know that you can --
11 I think you need to distinguish it in that
12 way. There has to be the sale. The sale is
13 done, the sale has closed, the sale is a final
14 order. This settlement is separate and apart
15 from that. And if you don't approve the
16 settlement, then this sale is unchanged and
17 nothing happens to the sale. But if they were
18 tied, and I could see that being a concern,
19 because you would say, well, isn't this just
20 some creative two-step process to get around
21 Jevic? In some sense maybe it is, but it's a
22 very risky one. Because at this point we have
23 a sale that closed with the assets in the
24 purchaser's pocket with no obligation to



1 contribute them whatsoever unless your Honor
2 approves this settlement. And so if somebody
3 wants to structure a deal that way, in such a
4 risky way, I don't think that's a legitimate
5 concern.

6 THE COURT: I'm speculating, but
7 I don't see it as an attempt to get around a
8 Supreme Court decision that hasn't come down
9 yet as much as I see it as an attempt to fit
10 into the ICL model, which was controlling law
11 as of the settlement date. But that's sort of
12 neither here nor there. It doesn't matter why
13 it's being done this way. You're right that
14 an independent sale order that's become final
15 has transferred these assets, and that's
16 separate from approval or disapproval of the
17 settlement.

18 But that doesn't answer my
19 fundamental point, which was to distinguish
20 this from ICL. And I don't have the brief in
21 front of me, but the quoted -- yeah, this is
22 in Mr. Kaplan's depth from ICL, "And the
23 Trustee presented no evidence that the
24 settlement funds were otherwise intended for



1 the Debtors' estate. All are true here. The
2 settlement sums paid by the purchaser were not
3 proceeds from its liens, did not at any time
4 belong to Life Care's estate, and will not
5 become part of its estate even as a pass-
6 through."

7 Did not at any time belong to
8 life care's estate. This did at one time
9 belong to this estate. There's no question
10 there. So doesn't that distinguish ICL?

11 MR. SHAPIRO: You know, if you
12 take that out of context, I suppose. And it's
13 true, I mean, you could at one point trace
14 assets to a lot of people and you could follow
15 where they go.

16 THE COURT: I'm telling you
17 you take it out of context, it's the
18 whole thing --

19 MR. SHAPIRO: Well, let me --

20 THE COURT: -- of the case.

21 MR. SHAPIRO: Sorry. Let me
22 rephrase. Yes, they were at one time owned by
23 the Debtor, but they were sold, and a purchase
24 price was negotiated, and that purchase price



1 was paid and the buyer bought them. They're
2 theirs. The buyer owns those causes of
3 action, no questions asked. And they're only
4 obligated to contribute them to the trust if
5 your Honor approves the settlement.

6 So yes, at one point the Debtor
7 did own them, but the Debtor doesn't own them
8 now. We have no claim to those causes of
9 action. We can't ask the purchaser to return
10 them, we can't ask the purchaser to do
11 anything with them. For all we know, the
12 purchaser brought them and started suing
13 individuals on account of those -- we don't
14 know. We have no control over that. And as
15 far as, yes, we did at one time own the causes
16 of action, but we don't anymore.

17 THE COURT: Well, I don't see
18 how the purchaser can pursue Chapter 5 causes
19 of action on its own behalf if it's not on
20 behalf of the estate, they're simply not able
21 to be pursued.

22 MR. SHAPIRO: That's fair, your
23 Honor, but that was only one component of the
24 specified causes of action. I was just using



1 it as an illustration, but that is a fair
2 point.

3 THE COURT: Fair enough. I get
4 it, I get it. You don't control the causes of
5 action. I understand.

6 MR. SHAPIRO: And just a couple
7 more points. I heard your Honor loud and
8 clear, and I should probably keep my mouth
9 shut. But I just wanted to make one point.
10 We haven't yet made a final determination as
11 to whether we're moving forward with dismissal
12 or conversion, but I think in both
13 Mr. LaForge's deposition testimony and other
14 filings we made before the Court, including
15 one in response to the dismissal motion, I
16 think that, it's safe to say that conversion
17 is the most likely outcome. I don't think
18 that this is going to be a dismissal. There
19 are causes of action that were not acquired by
20 the buyer, specifically causes of action that
21 belonged to the Columbus entities, and that
22 was a separate sale, that was a liquidation
23 sale, so they did not buy causes of action.
24 So while we've not valued what those causes of



1 action are, we cannot, we don't think, dismiss
2 those cases while they're there, because they
3 have some value, we just don't know what they
4 are.

5 THE COURT: I think that goes to
6 the point does Jevic live and die on the fact
7 that it has to be a structured dismissal. And
8 I think Ms. Casey did a nice job of going
9 through the concerns that the Supreme Court
10 had, and I don't think it's necessarily tied
11 to a dismissal, because there's certainly
12 language in the opinion that allows
13 intermediate settlements, like the Iridium
14 case, or critical vendor motions, orders, wage
15 orders that have this sort of bankruptcy
16 purpose or reorganization purpose.

17 But I think, you know, you're
18 right, I think this case is headed, if I deny
19 the settlement -- or if I grant it, I'm sorry.
20 If I grant the settlement, I think the case is
21 headed to dismissal or conversion, and
22 probably conversion. But where it's not
23 headed is a plan. And when it's headed to
24 dismissal or conversion, it's headed there



1 soon. So I think, you know, while I certainly
2 understand your point about how the dismissal
3 motion isn't necessarily tied to the
4 settlement motion, I think, you know, the case
5 is such, I don't have to ignore my common
6 sense, this case is either approval or not
7 approval of the settlement, is either headed
8 to dismissal or conversion in short order. I
9 may be wrong, I don't know. That's my feel.

10 MR. SHAPIRO: So a couple more
11 points, your Honor. On the releases, it is
12 true that we are providing, the Debtors are
13 providing some releases. But it can't be that
14 they are releases that makes this settlement,
15 you know, prohibited by Jevic. Then every
16 settlement would be prohibited by Jevic.

17 THE COURT: Why? Maybe every
18 settlement is prohibited by Jevic.

19 MR. SHAPIRO: Okay.

20 THE COURT: Well, I don't know.
21 Maybe every case ending priority skipping
22 settlement is off the table. I think it was
23 the Middle District of Tennessee, but
24 Bankruptcy Court in Tennessee just issued an



1 opinion that one could argue broadly
2 interpreted Jevic to deny a settlement. I
3 don't know where we are.

4 MR. SHAPIRO: I'm glad we're in
5 Delaware, I guess.

6 THE COURT: We'll see.

7 MR. SHAPIRO: Just one more
8 point, and this addresses the WARN claimants'
9 response. I want to be clear, the WARN
10 claimants had a bunch of issues with the
11 procedures in a dismissal motion. I informed
12 your Honor we're not going forward with that
13 dismissal motion. Even if by some miracle we
14 do dismiss and not convert, we're not seeking
15 approval of those procedures. So to the
16 extent the WARN claimants has an issue with
17 those procedures, that's certainly not
18 relevant to the court's consideration of the
19 settlement motion.

20 Finally, to the extent the WARN
21 claimants have an issue with us providing them
22 with information, they have an adversary
23 proceeding, they can seek discovery in the
24 context of that. Of course, we're trying, as



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1 I think the WARN claimant's counsel said
2 himself, we are trying to resolve that. But
3 there is a mechanism for them to get the
4 information that they want.

5 And I think that's it for me,
6 your Honor.

7 THE COURT: Okay. Thank you.
8 Mr. Kinel? You get the last word.

9 MR. KINEL: I hope it's a good
10 one.

11 Your Honor, I'm just going to
12 address a few points. I think it's pretty
13 clear that the U.S. Trustee is asking your
14 Honor to reverse the Third Circuit's ICL
15 decision. I heard Your Honor's comments a few
16 minutes ago, and I think the distinguishing
17 factors have been pointing to don't
18 distinguish the case at all. And I think that
19 the only way this settlement doesn't get
20 approved under ICL is to basically for this
21 court to conclude that ICL is no longer good
22 law.

23 The point made about -- well,
24 actually Ms. Casey said Jevic leads the door



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1 wide open for creative lawyers. Well, if
2 that's the case, I don't know if it is or
3 isn't, but the point, I think that's
4 effectively a concession that Jevic doesn't
5 deal with this case, and that the U.S. Trustee
6 would like it to, but it simply doesn't. The
7 idea that it's a fiction that there are
8 non-estate causes of action when somebody buys
9 something and returns them, and I heard your
10 Honor say something similar a moment ago,
11 number one, if I buy your house and I live in
12 it, yeah, once upon a time, you owned it, but
13 I owned it now, why does it matter? I don't
14 understand, no one has articulated a rule of
15 law as to why that was a distinguishing
16 feature in any case --

17 THE COURT: Well, and I'm not
18 saying you have the facts now, but if it's a
19 sham transaction, you can ignore the fact that
20 it was sold. I'm not saying these are the
21 facts, but if it was part of the conspiracy to
22 avoid Jevic and go back on what the
23 documentation said on August 16th and change
24 it to make sure that it stayed out of the



1 estate, I can collapse that transaction. I
2 don't have to honor it. And there are
3 plenty -- if those are the facts, you could do
4 that -- you know, it's in effect a fraudulent
5 conveyance. It's a transfer that's not a
6 transfer.

7 So there are plenty of ways to
8 avoid that kind of transaction if the Court
9 deems that that's the appropriate based on the
10 facts of the case.

11 MR. KINEL: Well, respectfully,
12 those are not the facts of this case.

13 THE COURT: Fair enough.

14 MR. KINEL: There's not a shred
15 of evidence that the economics of this
16 transaction ever changed or that the
17 noteholders would have paid an extra nickle
18 for this estate for the assets. As a matter
19 of fact, the noteholders kept their powder dry
20 and didn't even fully credit bid what they
21 could have in order to win that auction. The
22 idea that they just would have written a check
23 on top of -- if they had to increase their
24 credit bid, which they could have, that they



1 instead would have just written a check is
2 really just beyond credulity. It's not this
3 case. It's not what happened here.

4 The idea that the assets were
5 still the assets of the estate on the date the
6 parties came before the Court on approval of
7 the settlement, I don't see how that's
8 relevant. Nobody objected. If the U.S.
9 Trustee or some other party thinks that every
10 one of these transactions is a sham and that
11 you can't purchase estate causes of action,
12 then why not object at that point? That's the
13 point when somebody should have objected and,
14 said a minute, why are these estate causes of
15 action going through the noteholders? What
16 business does the Debtor have selling those?
17 What's the consideration for them? That
18 entire unless shouldn't be done today, it
19 should have been then. And nobody objected,
20 and this court approved that transaction.

21 And I just wanted to address one
22 of the apparently big distinguishing factors
23 that people are relying on and arguing about
24 the difference between ICL and this case is



1 the releases. And I think Mr. Shapiro touched
2 on it. But the releases that are set forth on
3 the term sheet, they released the noteholders
4 and the officers and directors and all that.
5 That was already done in the DIP. And that
6 was done, and didn't need to be a final DIP
7 order, that was gone in connection with the
8 interim, first interim DIP order.

9 The only other release that the
10 Debtor is giving is a release of the
11 Committee. That's worth nothing, okay? And
12 I'll represent to the Court that if that's the
13 deciding factor in this deal, we'll take that
14 out of the settlement, because that doesn't
15 distinguish this case from ICL, the fact that
16 the Debtors, just like every other settlement
17 you see, the parties who sign off on it want
18 mutual releases and exculpation. There's zero
19 value that came out of the estate for that
20 release. And that doesn't distinguish ICL.

21 The other factors -- I mean,
22 sure , you can pick apart, and do they line up
23 exactly? No. And the phrase that your Honor
24 quoted, does that sort of imply that, it says



1 did not at any time belong to the estate.
2 Yes, it says that. But I'm not sure that's
3 the holding. If you look at the opinion, and
4 actually, I read it again yesterday and
5 thought I had lost a page, because it ends
6 very strangely for a circuit court decision.
7 It really has no conclusion.

8 The last paragraph of the
9 decision is, "As noted, the Bankruptcy Code's
10 creditor payment hierarchy only becomes an
11 issue when distributing estate property.
12 Thus, even assuming the rules for bidding
13 equal ranked creditors from receiving unequal
14 payouts and lower ranked creditors from being
15 paid before higher ranking creditors apply.
16 In the 363 context, neither was violated
17 here."

18 So I guess we could debate what
19 the actual holding of ICL is, but I don't
20 think that that one phrase taken in isolation
21 versus that phrase or others is enough to
22 distinguish ICL from the facts of this case.

23 And yes, I apologize for
24 appealing to perhaps the Court's equitable



1 considerations here, but, you know, I believe
2 that you don't have to rely on that in order
3 to approve the settlement. I believe that the
4 burden has been met under the standards for a
5 9019 settlement. I don't believe any evidence
6 of any conspiracy, breach of duties, lack of
7 business judgment, I don't believe any of that
8 has been proven. It's conjecture. Why things
9 change and who changed them, the fact that an
10 email came from one person and went to another
11 doesn't mean that it was their idea. So we
12 don't have a lot of those facts, and the
13 reason we don't have them is our position has
14 been since day one, and I told Mr. Kaplan this
15 in our various discovery disputes. We don't
16 think they're relevant. The Court indicated
17 earlier today that it does think they're
18 relevant.

19 But the intentions of the
20 parties were to document a settlement whose
21 economic terms were put on the record on
22 August 16th, and nothing changed. There was
23 never any contemplation that those assets
24 would remain with the estate or that the



1 purchaser would have paid more had they not
2 agreed to this arrangement with the Committee
3 and the Debtors. Thank you, your Honor.

4 THE COURT: You're welcome.

5 All right, I'm going to take a
6 recess and then I'll come out and give my
7 ruling.

8 (A brief recess was taken.)

9 THE COURT: All right. Thank
10 you very much for your paper submissions.
11 Thank you very much for your arguments today
12 and your professional presentation of the
13 evidence and the argument. I really do
14 appreciate it. One of the real pleasures of
15 this job is the lawyers that appear in front
16 of me are so good.

17 I'm ready to rule, and I am
18 going to deny the settlement motion. And I do
19 that with some reluctance because looking at
20 the equities, as Mr. Kinel referenced in his
21 reply, doing this takes money away from
22 creditors and keeps it in the hands of the
23 purchaser, both the potential loss proceeds of
24 the avoidance actions as well as the cash that



1 was going to be paid. However, I am
2 constrained to do so by the facts and by the
3 law. And I'll talk about the law first.

4 As we all know and as we talked
5 a lot about, the Supreme Court ruled recently
6 in the Jevic case with regard to what the
7 courts can and cannot do in priority skipping
8 or class skipping settlements that don't have
9 the consent of the affected class. And the
10 argument that's primarily been made that Jevic
11 doesn't apply in this case is really focused
12 on the fact that the facts, and importantly,
13 the causes of action are not property of the
14 estate, they rest in the control and ownership
15 of the purchaser. And since they're not
16 property estate, ICL, the Third Circuit's
17 opinion in ICL, specifically provides that
18 they can be dealt with however the parties
19 wish without regard to the priority scheme or
20 the Bankruptcy Code, because it's simply not
21 applicable, and that Jevic doesn't apply
22 because of that.

23 So there are a couple of things
24 going on there. One, there's a question about



1 whether ICL applies to the facts of this case.

2 And I think it does not. I think the fact
3 that thesis state causes of action were
4 property of the estate on the petition date,
5 they were property of the estate on the day of
6 settlement, they were property of the estate
7 when the settlement motion was filed. They
8 are no longer property of the estate, but they
9 were at some point property of the estate.

10 And I don't think you can claim them for
11 purposes of the ICL ruling by transferring
12 them for some time to the purchaser with them
13 just to be transferred back. And at the time
14 of the closing of the transaction when they
15 were transferred, it was contemplated that
16 they would be transferred back hopefully very
17 shortly; we had a hearing set for December
18 16th.

19 So I think you can't -- I think
20 ICL is a narrow exception. I also think it's
21 not applicable here. And I think that if it
22 hasn't been overturned by Jevic altogether,
23 and I'm not ruling that it has been
24 overturned, I think it probably has been



1 significantly narrowed even further by the
2 Supreme Court's ruling in Jevic.

3 But in any event, assuming ICL
4 is still good law, assuming it has not been
5 affected by Jevic, I find that this case is
6 not controlled by ICL and doesn't fit ICL
7 because the causes of action were property of
8 the estate at one time. And the language that
9 I quoted during argument made a point, the
10 language from the opinion, makes a point in
11 approving the transaction in ICL that it is
12 important, among other things, that the
13 transferred assets did not at any time belong
14 to the Debtors' estate. So ICL is not
15 applicable.

16 Is Jevic applicable? I think
17 Jevic is applicable because even Jevic
18 involved, in part, transfer of assets that
19 were not property of the estate as part of the
20 settlement. There was the \$2 million from
21 Citi, and the lien contributed by Sun, and
22 neither of those were property of the estate.
23 Nevertheless the Court didn't draw a
24 distinction in its analysis in Jevic that was



1 focused one way or the other on whether the
2 property of the estate issue mattered or not;
3 it simply wasn't focused on by the Court. And
4 counsel who was there and represented the WARN
5 act plaintiffs represented to the Court, which
6 is fine, I certainly accept it at face value,
7 that it wasn't present in the Court's mind
8 because the appellees pretty much abandoned
9 the argument at some point during the
10 appellate process. But one way or another, it
11 wasn't on the mind of the Court.

12 So I don't think you can get too
13 into, you know, Jevic doesn't apply to this
14 because it's not property of the estate. That
15 sort of falls away, because there were
16 non-estate property elements of that
17 settlement that were not, and it was not
18 approved, and the Court really didn't delve
19 into it one way or another, but a distinction
20 that simply says Jevic doesn't apply because
21 none of the property here is property of the
22 estate, I think goes too far. I don't think
23 we can say with certainty that's the
24 distinguishing factor that would rule.



1 However, if I were faced with a
2 true ICL situation post Jevic, I'd be in a
3 tough spot. But I think I'd be constrained to
4 follow or enforce ICL. But again, I find it's
5 not applicable in this instance.

6 Also, the settlement here isn't
7 just the cash and the estate asset or the
8 causes of action. The Debtor is significantly
9 involved in this settlement. We've talked a
10 lot about the releases by the Debtors, the
11 releases by the Committee. There's a
12 continued, proposed continued involvement of
13 the Debtors in the claims reconciliation
14 process. We have the causes of action
15 themselves which will stay in the court and
16 arguably can only be brought by somehow
17 affecting property of the estate, so I'm not
18 even sure how that would work as a procedural
19 or jurisdictional matter.

20 But in any event, the releases
21 in particular, we're talking about actual
22 property of the Debtors' estate beyond the
23 causes of action. They're implicated by this
24 settlement. So it's not a pure, just like



1 Jevic wasn't pure, estate property versus
2 non-estate property, this settlement isn't
3 pure estate property versus non-estate
4 property.

5 So where does that leave us? I
6 think that we're in a situation, when you
7 think about Jevic here, is this more along the
8 lines of a wage order or a critical vendor
9 order or even a settlement order like in
10 Iridium that happens sort of halfway through
11 the case? The types of things the Court went
12 out of its way to say, look, you know, these
13 kinds of things may be okay as long as there's
14 some Bankruptcy Code related objective that
15 justifies violating the normal priority
16 scheme. And there's a focus on things like
17 does it promote a plan, does it promote
18 reorganization of the business? None of that
19 is going on here. It doesn't promote a plan,
20 it doesn't promote saving the business. It
21 promoted at the time a Code- related
22 objective, which was the sale of the assets
23 under 363. And it's a little awkward and
24 unfair to the Debtors and the Committee here



1 that we're looking at this settlement nine
2 months after it was reached and six months
3 after the claim, you know, the case, the asset
4 sales closed, so it kind of loses its
5 immediacy.

6 But I don't see the exception
7 that was talked about in Jevic applying under
8 the facts of this case. And I think it's
9 important, too, that we're not at the
10 beginning, we're not in the middle, we're at
11 the end of this case's Chapter 11 life. I
12 assume the case is either going to dismiss or
13 convert very shortly. I assume if I had
14 approved it, it was going to dismiss or
15 convert very shortly. The fact that this
16 settlement wasn't tied specifically to the
17 dismissal motion I don't think distinguishes
18 Jevic, either.

19 I'm not going to get into the
20 arguments about whether business judgment was
21 satisfied, whether there was a breach of
22 fiduciary duty by the Committee or by the
23 Debtors. I'm going to rule based on the
24 merits as I've described them. My alternative



1 ruling, though, is this -- or alternative
2 comment, rather, not ruling. Is forget Jevic
3 ever was written, and we were back where we
4 were in August of 2016 where the Third Circuit
5 had ruled on the Jevic opinion that they had
6 ruled on, and ICL is still good law, and you
7 can do structured dismissals in the Third
8 Circuit and anywhere else. I'm still not at
9 all convinced that I would have approved this
10 even under the quote/unquote old rules. And
11 that's because I don't believe the facts
12 support freezing out the priority creditors in
13 the way that the facts generally have
14 supported that in other structured dismissal
15 cases, for example, Judge Shannon's ruling in
16 Jevic, and the fact that the WARN act
17 claimants had to be frozen out because Sun
18 didn't want to fund litigation against itself,
19 so they weren't going to pay the WARN act
20 claimants, and that's just the way it was.

21 We don't have any evidence here
22 today that indicates why the priority
23 creditors were cut out of the equation and why
24 the deficiency claim creditors are being



1 treated differently. There's no evidence that
2 said, look, this had to be done, this was a
3 part of the deal. There was a lot of movement
4 between August and September over the terms of
5 the settlement. The economics may not have
6 changed, but certainly the details changed,
7 and I think the economics for priority
8 creditors changed, and I think the economics
9 for deficiency creditors changed, because the
10 document that was alive in August was not the
11 document that ultimately ended up controlling
12 the transaction in September.

13 So I'm not ruling on this basis,
14 but I just simply note that I think that even
15 under the old rules of structured dismissals
16 that are no longer applicable, I was still
17 very troubled, and I think I had real concerns
18 and may not have approved the settlement in
19 that instance. But that's neither here nor
20 there, because we live under the new rules and
21 the new order, and in the first Jevic world,
22 this just doesn't satisfy the law.

23 So sorry it's a rather lengthy
24 ruling, but for those reasons, I am going to



1 deny the motion. The Court will enter an
2 order. And I think that moots the procedures
3 motion.

4 MR. RAMOS: Thank you, your
5 Honor. Marcos Ramos. I think that's correct,
6 and therefore, nothing further on the agenda.
7 We thank your Honor very much for the time you
8 scheduled today and for spending the day with
9 us.

10 THE COURT: Of course; happy to
11 do that. Thank you very much; we're
12 adjourned.

13 (Hearing adjourned at 4:35 p.m.)
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1 State of Delaware)
2 New Castle County)

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4
5 CERTIFICATE OF REPORTER

6
7 I, Jennifer M. Guy, Registered
8 Professional Reporter and Notary Public, do
9 hereby certify that the foregoing record,
10 pages 1 to 256 inclusive, is a true and
11 accurate transcript of my stenographic notes.

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16 Jennifer M. Guy, RPR
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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2025, I electronically filed *United States Trustee's Objection to the Debtor's Motion to Sell Substantially all of its Assets* with the Clerk of this Court using the CM/ECF system which will send notification of such filing to all ECF registrants in this case. I further certify that the foregoing was emailed to the following:

McDermott Will and Emery LLP
1000 N. West Street, Suite 1400
Wilmington, Delaware 19801
Attn: David R. Hurst (dhurst@mwe.com)
Jonathan Levine (jlevine@mwe.com)
Lucas Barrett (lbarrett@mwe.com)
Bradley Thomas Giordano
(bgiordano@mwe.com)
Carmen Dingman (cdingman@mwe.com)

Seward and Kissel LLP
One Battery Park Plaza
New York, New York 10004
Attn: Gregg S. Bateman
(bateman@sewkis.com)

Chipman Brown Cicero & Cole, LLP
Hercules Plaza
131 N. Market Street, Suite 5400
Wilmington, Delaware 19801
Attn: Mark L. Desgrosseilliers
(desgross@chipmanbrown.com)

Pachulski Stang Ziehl & Jones LLP 780 Third
Avenue, 34th Floor
New York, NY 10017
Attn: Bradford J. Sandler
(bsandler@pszjlaw.com)
Paul J. Labov (plabov@pszjlaw.com)
Cia H. Mackle (cmackle@pszjlaw.com)

Ropes & Gray, LLP
1211 Avenue of the Americas
New York, New York 10036
Attn: Gregg M. Galardi
(gregg.galardi@ropesgray.com)
Sam Badawi (sam.badawi@ropesgray.com),
Lindsay Barca
(lindsay.barca@ropesgray.com)

/s/ Linda J. Casey
Linda J. Casey, Trial Attorney